LAW,

Or a Diſcourſe thereof,

IN

FOUR BOOKS.

Written in French

By Sir HEN. FINCH Kt.

His Majeſties Serjeant at Law.

And done into Engliſh by the ſame Author

Leges nobis charæ eſſe debent, Non propter literas, ſed propter earum rerum, quibus deſcriptum eſt, utilitatem, & eorum, qui ſcripſerunt, ſapientiam. Cic.

LONDON,

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THE EPISTLE To the READER.

THis Book, being formerly publiſhed in the proper and genuine Language, had, as it well deſerved, good acceptation, the Author and the Work mutually adding to each others Eſteem. And herein the Matter was no leſs profitable, than the Manner uſefull and ingenious: So that this only, of all the Books of Law (as concerning the Method) is without Preſi-

dent. Herein you may find a triple relation distinguished by the various Print. In the first, you have the Maxims and positive grounds of the Law, with whatsoever is added or explaned by Statutes concerning the same, Which taken apart, will afford a continual sensible discourse. In the second is contained the proofs and examples of those Maxims. And because that precious Flower of the Crown, the Kings Prerogative, may not be valued in the hands of a common person, such Cases as concern the King ore severed from the rest.

To impart good is to improve it, which was one cause of the translation of this Book yet is it not thereby made so facile as to descend to vulgar capacities; witness the very phrase,

phraſe, the terms of Art, excluding all hope of accrue to Lay-conceited opinions. Neither ſpeaketh it at adventure, but as the Author taught, and no otherwiſe; whoſe fame will affirm, and none will deny, but that he beſt knew how to fit and adorn his own Work.

Now remaineth only to extenuate the faults, either thoſe material in the Copy, or literal in the Print, the firſt a judicious Reader is able to ſupply, a little labour will correct the reſt: He that is courteous will remit both. To plot and to perfect at once, is to be more than man. Such was the pain to compoſe, that the Child waſted its own Parent therein, nevertheleſs being unhappy preventing the bleſſing of Perfection, and becoming an Abortive; But be

you the Guardian, ſo much It invites, the Author merits more. His propoſed end was to enrich others by this expreſſion of his love, cover therefore the faults occaſioned by an Error of Love, and redeem Him, that for your ſake is imbarqued in the common Cenſure of all Men.

J. L.

THE FIRST BOOK OF LAW.

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CHAP. I.

Of the Law of Nature.

LAw is an Art of well ordering a Civil society. In Greek it is called νόμος ἀπὸ τοῦ νέμειν *a distribuendo*, because it gives and distributes right to every one. In Latine it hath its name *Lex*, not *aligando*, as some would have it, although Law indeed be *vinculum civitatis*, nor *à legendo*, which is to read; though I find that to please *Bracton* most: but as he that best could tell derives it, *a legendo*, which is to choose, because of the choice & exquisite wisdom that is in it. *Nam ut illi* (saith *Tully* speaking of the Grecians) *aequitatis, sic nos delectus vim in Lege ponimus, & proprium utrumque legis est.* The Hebrews call it תורה (*Iborah*) from the root ירה (*jarah*)

Bract. lib. 1. ca. 3.

Cicol. 1. de Legib.

which is to teach: because it is the doctrine of truth, as *Plato* saith in his ninth book περὶ τῶν νόμων, *Leges ad hominum doctrinam ponuntur.* So that Law carrieth with it, and hath (as it were) inclosed in the name and nature of it, those three laws ἐγκυκλοπαιδεία and golden chain of all good learning, *Lex veritatis, Lex Justitiæ, Lex sapientiæ.* And therefore is not only ἐπιστήμη, *scientia*, but ἐπιστημονικοτάτη *Scientificissima.* Whereupon *Plato* telleth us, *Nomen menti consentaneum* (that is, to God, whom the Philosophers call νοῦς or *mens*, which is Truth, Wisdom, and Justice it self) *possidet divina nobis & admirabilis lex.* So that the name it self doth shew the Author from whence it came, and as he saith, *Qui tanti talem genuere parentes.*

Plato l. 4. de Reipub. τόνομα νῷ προσῆκον κέκτηται ὁ θεῖος ἡμῖν καὶ θαυμαστὸς νόμος.

Laws are Native or Positive. *Tully* in his Oration *pro Milone*, takes us out this Lesson: *Est enim hæc non scripta sed nata lex, quam non didicimus, accepimus, legimus, verum è natura ipsa arripuimus, hausimus, expressimus: ad quam non docti sed nati, non instituti sed imbuti sumus.* In his first book *de Legibus* he doth again repeat it. *Constituendi vero juris ab illa summa Lege capiamus exordium, quæ seculis omnibus ante nata est quam scripta Lex ulla*: Where this Native Law he calleth *summam legem*, as that from which all other laws do stream.

Native are those Laws, which are in us of themselves, and therefore unchangeable and perpetual.

These

These are twofold, like those two great lights, which God hath set in the firmament of our heart, Nature and Reason; For being proper to a man, as he is a man and reasonable creature, they may be divided as reason it self is divided. They that have travelled most in the grounds of Nature, distinguish that excellent faculty of Reason (which of all earthly creatures man only hath) into two other faculties, νοῦς or the mind, and διάνοια or the reasoning part; νοῦς they call that faculty of the soul that offereth unto us things clear & lightsome of themselves, without any further reasoning or discourse. By διάνοια they mean that faculty of the soul, that by discourse of reason doth deduce & draw one thing from another. From hence the masters and professors of the art of reason, make judgment (which is the flower of all reason, & in effect nothing else but *ratio conjuncta*, reason set together) to be *Noeticum* or *Dianoeticum*. We by their example may distinguish those which we call Native Laws, and are the foundation of all other laws, into Primitive, which is that they call *Noeticum*, we, the law of Nature; or secondary rules of reason, which is their *Dianoeticum*, with us the Law of reason. And these very names of νοῦς and διάνοια or λογισμὸς, which is all one, reason and the discourse of reason, both *Plato* and *Tully* speaking of the laws do give them.

The Law of nature is that sovereign

Lex naturæ est ratio summa insita in hominis natura, quæ jubet ea quæ facienda sunt, prohibetque contraria.

reason fixed in mans nature, which ministreth common principles of good and evil. In effect nothing else but those κοιναὶ ἔννοιαι or *Communes notitiæ*, which the Philosophers speak of; That men must live peaceably together: That we are not to do unto another that which we would not have done unto us: That Justice is to be done to all men, and such like. Of this *Tully* speketh 2. *de legibus. Principem illam legem & ultimam mentem esse dicebant.* Where he likewise calleth it the high & supream law of all. And in another place, *Natura juris ab hominis repetenda natura* because the light hereof, as the light of the Sun, shineth most clearly, and in the eyes of all men.

Cic. lib. 2. de Leg.

CHAP. II.

Of the Law of Reason.

THE Law of reason is that which deduceth principles by the discourse of sound reason. Whereof *Tully* saith, *Ratio cum est in mente hominis confirmata & confecta, lex est*: And again, *Lex est radius divini luminis*: and *recta ratio summi Jovis. Plato*, by way of Poetical fiction doth imagine that there were at the first, two contrary humors that reigned in man, and (as it were) two fools of his councel that did rule him, Pleasure and Pain.

Cic. lib. 1. de Leg.

Plat. l. 1. de Legib.

Pain. Each had two other affections to attend them, Hope of good things to come, and Fear of future evils, whereby mens minds were haled and pulled hither and thither, and diversly distracted. Then to govern both, God set in man λογισμὸν, the reasoning or discoursing part, to teach what is good or bad in either; which he calleth τῷ λογισμῷ ἀγωγὸν χρυσὸν καὶ ἱερὸν, the golden & sacred rule of reason. We may term it, that uncorrupt reason which *Adam* had at the first in full perfection: but through *Adams* fall (that brought sin into the world, and the fruit of sin, Blindness and corruption) that excellent image of reason is now so wonderfully defaced, even in the best and wisest, that the light of this, as the light of the Moon, shineth more obscurely: But yet shineth so that from it all the other Laws receive their Light.

And hereupon are grounded more or less clearly, divers rules of reason, that very where go for undoubted Oracles, which (confirmed by judgement, learning, and much experience, and rightly & well applied) are so many stars and shining lights, to direct our course in the arguing of any case: yea such is their singular and incomparable use, that, as Lords paramount, they rule & over-rule the grounds themselves. And rather than any of these (rightly understood) should fail, the very

maxims and principles of the positive law will yield, as to a higher and more perfect Law.

CHAP. III.

Of rules taken from other learnings.

THE rules of reason are of two sorts some taken from foreign learnings, both divine and humane: the rest proper to the Law it self.

Of the first sort are the principles, and sound conclusions from foreign learnings. Out of the best and very bowels of Divinity, Grammer, Logick; also from Philosophy natural, Political, Oeconomicks, Moral, though in our reports and year books they come not under the same terms, yet the things which there you find are the same; for the Sparks of all Sciences in the world are raked up in the ashes of the Law: and well doth one say, *Non ex Prætoris edictis, neque a 12 tabulis, sed penitus ex intima philosophia hauriendi juris disciplina est.* He that will take the whole body of the law before him, and go really and judicially to work, must not lay the foundation of his building in Estates, Tenures, the gift of Writs, and such like, but at those current and sound principles which our books are full of.

Cic. l. 1. de legibus.

Fit

First from Divinity, the doctrine of Religion, the head and Master-piece of all the rest, whereof S. *Augustine* saith truly, *Omnium legum est inanis censura, nisi divinæ legis imaginem gerat.* From hence we have these two rules. *Aug. lib. 9. de Civitat. dei.*

To such Laws of the Church as have warrant in holy Scripture, our Law giveth credence. 34 H. 6. 4c. *Prisot. A tels leys que eux de St. eglice ont en cunetent escripture, covient pur nous a donor credence: car ceo est common ley, sur que touts manner leys sont fondues,*

1. The Sabboth day is no day for law Cases. Upon a fine levied with Proclamations according to the Statute, 4 H. 7. Cap. 24. if any of the Proclamations be made on the Lords day, all the Proclamations are erroneous, for the Justices may not sit upon that day, but it is a day exempt from such business by the Common law for the solemnity of it, to the intent that all people may apply themselves that day to prayer and serving of God. 4 *Eliz.* 265.

No Plea shall be holden *Quindena paschæ*, becaufe it is always the Sabbath, but it shall be *Crastino quindenæ paschæ.* *F.N.B.* 17. *f.*

If a Writ of *Scire facias* out of the Common place bear *Teste* upon a Sunday, it is error, becaufe that is not *Dies juridicus in Banco.* 1 *Eliz. Ey.* 168.

No sale upon a Sunday shall be said a sale in market overt to alter the property. 12 *E.* 4. 8.

Of Grammer, the rules are infinite in the Etymologie of words, and in the construction of them, what their nature is

single, what joyned with other: among the rest which need not be remembred, this one we have common in our Books.

2. Words in construction must be referred to the next antecedent, where the matter it self doth not hinder it.

32 H.8. Dy. 46. b. An Endictment of murder, found in this sort, That *Eliz. fuit in pace &c. quosque A. vir præfat. Eliz. de D. in Com. S. Yeoman*, did kill her, is good; for the addition Yeoman, must of necessity referr to the husband, because the woman cannot be a Yeoman; but an endictment *quosq; Alicia S. de D. in Com. S. uxor I. S. Spinster, &c.* is not good against *Alice S.* for there Spinster being an indifferent addition, both for man and woman, must referr to *I.S.* which is the next antecedent, and so the woman hath no addition. So of an endictment against *I.S. serviens I.D. de D. in Com. Midd. Butcher*: This is not good, for Servant is no addition; and Butcher referreth to the Master, which is the next antecedent. 9 E. 4. 48.

From Logick;
In the Maxim of causes and effects.

3. The cause ceasing, the effect doth likewise cease.

9 E. 4. 8. b. The King granteth an Office to one at will,

will, and ten pound fee during life *pro officio ille*, now if the King put him from his office, the fee ſhall ceaſe.

The Executor, nor husband (after the death of his wife gardein in ſoccage) ſhall retain the Wardſhip, for the Gardein hath it not to his own uſe, but to the benefit of the Heir: and the Executor, or husband have not the affection which the Teſtator or his wife had, which was the cauſe that the Law gave them the Wardſhip. 7 *Eliz.* 293. *b.*

If a ſtroke be given the firſt day of May, and the King pardon him the ſecond day of May, all felonies and miſdemeanors, the party ſmitten dieth the third day of May, ſo as this is no felony till after the pardon, yet the felony is pardoned, for the miſdemeanor is pardoned, and therefore all things purſuing are alſo pardoned. 13 *Eliz.* 401. —

The King hath a Ward, *pur cauſe de gard*, and after maketh livery to the firſt Ward, now the ſecond Ward ſhall not ſue livery. 13 *E.* 4. 10. *b.*

If two Coparceners make a Leaſe reſerving a rent, they ſhall have this rent in common, as they have the reverſion: But if afterwards they grant the reverſion, excepting the rent, then they ſhall be Joyntenants of the rent. —

It is no principal challenge to a Juror, that he hath married the parties mother, if ſhe be dead without iſſue, for the cauſe of favour is removed. 14 *H.* 7. 2.

4. Things

4. Things are construed according to that which was the cause thereof.

44 *E.* 3.14. *b.* A man makes me swear to bring him money to such a place, or else he will kill me, I bring it him accordingly: This is felony in him. So if he make me swear to surrender my estate unto him, and I do so afterwards, this is a disseisin to me.

14 *Ass. pl.* 20.

21 *E.* 4. 68. *b.* One imprisoned till he be content to make an obligation at another place, and afterwards he doth so, being at large, yet he shall avoid it by dures of imprisonment.

3 *E.* 3. 84. Outlary in trespass is no forfeiture of land, as outlary of felony is: for though the not appearing be the cause of outlary in both; yet the force of the outlary shall be esteemed according to the hainousness of the offence, which is the principal cause and foundation of the process.

A man and feme sole have a villein, and afterwards entermarry, and the villein purchaseth land, they shall not have the land by entierties, but by moieties joyntly, or in common, as they had the villein.

5. According to that which was the beginning of it.

33 *Ass. pl.* 7. If a Servant (departed out of his Masters service) kill his Master upon a malice that he bare him whilst he was his servant, it is petty treason.

A. creats

A. erects a Shop upon the Kings Freehold, the King grants the land to *B.* in fee; *A.* before entry or seisor of the shop by the Kings Patentee, continueth his possession and dieth seised. This is no descent to toll the Patentees entry: for by his first erecting of the Shop, he could gain nothing against the King. 10 *Eliz. Dy.* 266. *b.*

6. And therefore a derived power cannot be greater than that from which it is derived.

The Attorney of one that is disseised cannot make claim off from the land, if the disseisee himself durst have gone to the land. *Litlet.*

The Bailiff of a disseisor shall not say, That the Plaintiff never had any thing in the land, for the Master himself shall not have that plea, because he is not Tenant of the Freehold. 28 *Ass. pl.* 4.

The Servant shall be estopped to say, The Freehold is his Masters, by recovery against his Master, though the servant himself be a stranger to it, for he shall not be in better condition than he in whose right he claimeth. 2 *E.* 4. 16.

7. Things are dissolved as they be contracted.

An Obligation, or other matter in writing cannot be discharged by an agreement by word. 19 *E.* 4. 1. *b.*

In

5 *E.* 7. 33. In an annuity growing by preſcription *rien arere* is a good plea, for this preſcription is a matter in fait: but in an annuity by deed it is no good plea, without ſhewing an acquittance.

4 *E.* 7. 7. *b.* When a man avoids the Kings title by as high a matter of record as the King claimeth, he may have it by way of plea, without being driven to his petition, though the King be entituled by double matter of record; as one is attainted of treaſon by Parliament, and an office finds his lands, whereby the King ſeiſeth them, The party may alledge reſtitution by Parliament, and a repeal of the former act.

8. Things grounded upon an ill and void beginning cannot have a good perfection.

10 *El.* 344. An Infant, or a feme covert make their will, and publiſh it, and after dying of full age, or ſole, yet the will is nothing worth.

One diſſeiſed of two acres in *D.* releaſeth all his right in all his lands in *D.* and delivereth it to a ſtranger, to be delivered over to the diſſeiſor as his deed, ſuch a day: before which day, the diſſeiſor diſſeiſeth him of another acre in *D.* and then the releaſe is delivered over to him, yet nothing of the right of this third acre paſſeth by the releaſe.

9. He

9. **He that claimeth per amount, a thing shall never take benefit nor hurt by it.**

Two Joyntenants, one makes a leaſe for years of his moity, reſerving a rent, and dyeth. The ſurviving Joyntenant ſhall have the reverſion of his moity, but not the rent, for he cometh in by the firſt feoffor, and not under his companion. So of the wife, where the husband being leſſee for years in her right, maketh a leaſe of part of the term, reſerving a rent. 2 & 3 *El. Dy.* 187.

An Executor recovereth and dieth inteſtate, adminiſtration of the goods of the firſt teſtator is committed to *I.S. I.S.* ſhall not ſue execution upon this recovery.

Dower cannot be aſſigned, reſerving a rent, or with a remainder over, for ſhe is in from the husband, and not from him that aſſigneth dower.

10. **According to the end.**

Vouchee cometh into the Court to be viewed, and being viewed, is awarded of full age; yet he ſhall not be driven to anſwer, till he come in to the ſame intent by other Proceſs. 31 *E.* 3. *Fitzh. der on aid*, 10.

The vouchee, upon a *Grand cape ad valentiam*, ſhall not loſe the land, though he cannot ſave his default, for the proceſs is only to this end to have him to appear. 19 *E.* 4. 3.

A man that is warned by Writ to anſwer 50 *Aſſ. pl.* 2.

ſwer to a matter, ſhall not be driven to anſwer any other matter than is contained in that Writ, though the King be party, As if by office it be found, that lands in chief deſcended to I.S. a fool natural, and that A. occupieth them, whereby a *Scire facias* goeth out againſt A. to anſwer why the lands ſhould not be ſeiſed into the Kings hands for the Ideocy of I.S. A. commeth in and pleads, That I.S. when he was of perfect memory, made a releaſe to one B. who infeoffed A. This is good enough without ſhewing any licence of alienation to diſcharge himſelf from the purchaſing of thoſe lands.

In the maxim of Subjects and Adjuncts.

11. **Where the foundation falleth, all goeth to the ground.**

A Church appropriated to a ſpiritual
3 *E.* 374. *b.* corporation, becometh diſappropriate, if the corporation be diſſolved.

A diſſeiſor of lands in ancient demeſn
49 *E.* 3. 8. the Lord confirms unto him to hold at the Common Law, the diſſeiſee reentreth; now the land ſhall be ancient demeſn again: for the eſtate (whereupon the confirmation ſhould inure) is defeated.

When an eſtate (to which a warranty is
Lit. knit) is undone, the warranty alſo is undone. As if Tenant in tail diſcontinue, and the diſcontinuee is diſſeiſed (or make

a

a feoffment upon condition) in whose poſſeſſion a collateral anceſtor of the iſſue in tail releaſeth and dieth, the iſſue is barred. But if the diſcontinuee enter upon the diſſeiſor (or upon the feoffee for the condition broken) the iſſue is reſtored to his formedon.

12. **Things incident cannot be ſevered.**

Eſtovers, or wood granted to be burnt in ſuch a houſe, ſhall go to him that hath the houſe, by whatſoever title: for one is inſeparably incident to the other. 12 *El.* 381.

Lord & Tenant by fealty and homage, the Lord releaſeth his fealty; this is void: for fealty is incident to homage. 7 *E.* 4. 11.

An office of skill and diligence, or annuity, *pro concilio impendendo*, cannot be forfeited by attainder of treaſon. 12 *El.* 379.

A Court baron is incident to a mannor, and Court of Pipowders to a Fair: therefore one cannot grant the mannor or fair, reſerving thoſe courts. Where one holdeth of a man to keep his Caſtle, the Lord cannot grant his Caſtle guard, reſerving the Caſtle. 19 *H.* 8. *Br. incidents* 34. 31 *E.* 3. *Aſſ.* 441.

13. **Things by reaſon of another, are of the ſame plite.**

The cuſtom of Gavelkind is not changed, though a fine or recovery be had of the ſame at the Common Law: for this is

a

a cuſtome by reaſon of the land, and therefore runneth always with the land.

6. E. 6. Dy. 72. b. But otherwiſe it is of lands in ancient demeſn, partible among the males: for there the cuſtom runneth not with the land ſimply, but by reaſon of the ancient demeſn: and therefore becauſe the nature of the land is changed by the fine or recovery from ancient demeſn to land at the Common Law, the cuſtom of parting it among the males is alſo gone.

F. N. B. 21. b. An erroneous recovery had of lands in Borough engliſh, the puiſne ſon ſhall have a Writ of Error, becauſe the land it ſelf goeth to him. So ſhall all the ſons of lands in Gavelkind.

42 E. 3. 3. Two Coparceners make partition, and one covenants with the other to acquit the land: now if the Covenantee alien his part, the Alienee ſhall have a writ of Covenant.

Perſonal Things.

14. Cannot be done by another.

7 H. 4. 19. Suit of Court cannot be done by another.

22 E. 4. 34. A man cannot excuſe himſelf of a contempt (as of not ſerving the Kings Proceſs) by Attorny, but in proper perſon.

15. Cannot be granted over, as matters of pleaſure, eaſe, truſt, and authority.

A

A licenſe to hunt in my Park, to go to Church over my ground, to come into my houſe, to eat and drink with me, cannot be granted over. So of a way granted for life over my ground. — 12 *H.* 7.25. 7 *H.*4.36.

The Patentee for life of an office of truſt, as to be a Chamberlain of the Exchequer, Squire of the body cannot aſſign it, unleſs it be ſpecially limited in his Patent that he may. For then he might grant it to one in whom the King hath no truſt, or that would be negligent, &c. 11 *E.* 4.1.

The keeperſhip of a Park, Stewardſhip, Baylywick of Husbandry, &c. for life, cannot be granted over, becauſe they are offices that require skill and diligence. 12 *El.*179.

A. licenſeth B. to do an act: B. cannot grant this licence to another. *Br. licences* 25.

A Warrant of Attorney made to one to deliver ſeiſin, he cannot grant this his authority over. 19 *H.*8.10.

16. Die with the perſon.

When a corporal hurt or dammage is done to a man, as to beat him, &c. if he or the party beaten die, the action is gone. 12 *H.*8.12. —

Leſſor covenants to pay quit-rents, during the term, and dieth, his executors ſhall not pay them: for it is a perſonal Covenant, which dieth with the perſon. 1, & 2. *P.* & 114.

Among the diſagreeable arguments.

First from thoſe that differ only in

a certain respect and reason not in deed and in nature.

Things do inure diverſly, according to the diverſity of

17. Time.

26 *Aſſ. pl.* 66. Lands given in Frank-marriage, reſerving a rent, the reſervation is void till the fourth degree paſt, and afterwards good.

Perſon, viz.

18. The ſame perſon.

14 *H.* 8. 6. One that hath a rent-charge going of the wives lands, releaſeth it to the husband and his heirs: the husband yet ſhall not have it, but it ſhall enure him by way of extinguiſhment only, as ſeiſed in right of his wife.

19. Several perſons.

1 *& 2. P & M.* 104. A man makes a leaſe of a Mannor, except an acre, this acre is no part of the Mannor, as to the leſſor, but as to him that hath right to demand the Mannor, by an eigne title, it remaineth parcel, and therefore he ſhall make no forepriſe in his Writ.

11 *E.* 4. 2. If Tenant in tail and his iſſue diſſeiſe the diſcontinuee of Tenant in tail, and tenant in tail die, whereby the lands deſcend to the iſſue: Now he ſhall be remitted, and ſhall be in as tenant in tail againſt every ſtranger,

ſtranger, and darreign the firſt warranty; but not as againſt the diſcontinuee, becauſe he was *Particeps Criminis*.

Then from Relatives,

20. No man can do an act to himſelf.

A man cannot preſent himſelf to a benefice, make himſelf an officer, nor ſue himſelf: and therefore when a man having right to land, hath the freehold caſt upon him by a latter title, he ſhall be ſaid in of his ancient title, becauſe there is no body againſt whom he may ſue, but himſelf, and he cannot ſue himſelf. 13 *H.* 8. 22. *Lit.* 147. *b.*

No more can a man ſummon himſelf. And therefore if the Sheriff ſuffer a common recovery, it is error, becauſe he cannot ſummon himſelf. 8 *H.* 6 29. 3 *El. Dy.* 188.

A man cannot be both Judge and party in a ſuit. 4 *M. B. Com.* 25.

And therefore if a Juſtice of the common place be made a Juſtice of the Kings Bench, though it be but *hac vice*, it determineth his patent for the Common place. For if he ſhould be judge of both Benches together, he ſhould control his own judgments: for if the Common place err, it ſhall be reformed in the Kings Bench.

Of Compariſons.

From the equals.

21. **Things are to be construed,** *Secundum aqualitatem rationis.*

(t) 27 *l.Coo.* 3.136. *Sir Wil. Herberts case.*

Upon a recognisance acknowledged by the Ancestor, or a Judgment in an action of debt given against him: if he die seised of two Acres, whereof one holden in Borough English, or having issue two daughters which make partition, or if he die without issue, whereby part of his land descendeth to the heir of his fathers part, and part to the heir on the part of the mother: in all these cases if one only be charged, he shall have contribution against the other: for they are in *æquali jure.*

D. 26. *al.* pl. 37.

If two, four, or more men being severally seised of land, joyn in a recognisance, all their lands must equally be extended.

Bract. l.c. 3.

And this is a logical vertue, a kind of equity, as *Bracton* calleth it, where he saith, *Æquitas est rerum convenientia, quæ paribus in causis paria jura desiderat, & omnia bene coæquiparat: & dicitur æquitas quasi æqualitas.* Whose nature is to amplifie enlarge, and add to the Letter of the Law.

Especially this shineth and sheweth forth it self in the exposition of Statutes, by extending things there provided to mischiefs in the like degrees, whereof the examples every where are pregnant, and in guiding the grounds and maxims of things, that newly start up, by the rule of the Common Law.

(u) 23 *H.* 8. *Fitz.*

Uses at the Common Law were (u) nothing, yet in time gaining greater regard to

to be imputed among inheritances, are demeaned as other inheritances at the Common Law. So as a *poſſeſſio fratris* ſhall be of them, and of lands in Borough Engliſh, the uſe ſhall deſcend to the puiſne. And now alſo theſe uſes being turned into eſtates, ſhall be demeaned in all reſpects as eſtates in poſſeſſion.

So when (*b*) Cuſtom createth inheritance in Copyhold lands, and maketh the lands deſcendable, then ſhall the Law direct the deſcents according to the maxims and rules of the Common Law, to have a *poſſeſſio fratris*, and ſuch like: but not in collateral things, as Tenancy by courteſie Dower, deſcent to toll an entry, &c. (*b*) *Coo.* 4. 12.

From the greater and the leſs.

22. **The greater doth contain the leſs.**

By a pardon of murder, manſlaughter is pardoned.

An attaint ſuppoſing a verdict to have paſſed before two Juſtices, whereas it paſſed before four, is good enough.

A recovery pleaded of three Acres, where it was of ſix, is good enough.

A Condition that I. ſhall not infeoff I. S. is broken, if I. infeoff him and I. D.

A Copy-holder of a mannor where the cuſtom giveth liberty to demiſe in fee, may demiſe it for any leſs eſtate, without other preſcription.

Where the cuſtom is, that a man ſhall

18 *El.* 38. not deviſe his lands for any higher eſtate than for term of life, yet if a deviſe be in fee, and the deviſee claim but for life, the deviſe is good.

3 & 4 *P. & M. Dy.* 150. *b.* By the Statute 32 *Hen.* 8. that giveth power to deviſe two parts of ones lands, a deviſe of the whole had been good for 2 parts, though the Statute 34 & 35. *H.* 8. of explanations had not been made.

23. **A matter of higher nature determineth a matter of lower nature.**

21 *H.* 75. A man hath liberties by preſcription, & after taketh a grant of thoſe liberties by Letters Patents from the King, this determineth the preſcription, for a matter in writing determineth a matter in fait.

33 *H.* 8. *Dy.* 50. If an offence, which is murder at the Common Law be made high Treaſon, no appeal ſhall lie of it, becauſe the offence of murder is drowned, and it is puniſhable as high treaſon only, whereof no appeal lieth.

24. **The more worthy thing draweth to it things of leſs worthineſs.**

11 *H.* 4. 31. An adulterer takes away another mans wife, and puts her in new clothes, the husband may take the wife with her clothes.

10 *El.* 323. *b.* A Box enſealed with charters, it ſhall go to the Heir with the charters, and not to the Executors.

A

A base Mine where there is Ore, shall be the Kings for the worthiness of the Ore.

The body of a man is more worthy than land, therefore land shall follow the nature of the person. 3 *El.* 238.

As a villain shall make free land to be villain land, but villain land shall not make a free man to be a villain.

So the Kings land which he hath in his natural capacity, shall de demeaned according to the priviledge and prerogatives of his body royal.

And therefore

25. Things accessary are of the nature of the principal.

A servant procureth another to kill his master: this is no petty Treason in the servant, because it is but felony in the other which is the principal. 40 *Ass. pl.* 25.

A Parson grants an annuity with a *Nomine pœnæ*, the successor shall be charged with the *Nomine pœnæ* due in his predecessors life, and not his executors. 7 *H.*6. 19. *b.*

The profits of the office of a Filizer, &c. cannot be put in execution upon a recognizance, Statute, &c. because the office it self, being an office of truft, cannot. 27 *H.*8. *Dy.* 7. *b.*

Tythe is not payable of Oaks usually topped and lopped (though it be every seven or eight years) for the branches are of the nature of the principal (that is to say) the 26 *El. Molin.*

Oak it ſelf, for which no Tithe is to be paid.

26. A mans own words are void, when the Law ſpeaketh as much.

30 *Aſſ. pl.* 8. Lands given to two, *& uni eorum diutius viventi*, they make partition, and one dyeth, yet the leſſor ſhall have again the moity of him that dyeth, for *uni eorum diutius viventi* are but idle words, becauſe (without them) the Joyntenant, by courſe of Law, is to have all, if he do ſurvive.

From the rule of method.

In things of Formality.

27. The generals muſt go before, and the ſpecials follow after.

(c) *The rule of the Regiſter.* In a Writ the (c) general ſhall be put in demand, and in plaint before the ſpecial: as land before pree, paſture, wood, juncary, mariſh, &c. wood before alders, willows, &c.

28. The more worthy is to be ſet before the leſs worthy.

Ibid. The entire thing ſhall be demanded before the moity part or parts.

Ibid. The thing of greater dignity before that which is of leſs: as a meaſe before land, a Caſtle

Caſtle before a meſſuage or mannor.

In a Replevin if it be of two Cattels, one quick and the other dead, the living thing ſhall be firſt demanded. *Ibid.*

Where one hath a preſentment to a Church two turns, and another the third turn: he that hath the third turn, bringing a *Quare impedit*, ſhall not begin with his own turn firſt, but with the other two turns.

Next are the precepts of Natural Philoſophy.

29. **Law reſpecteth the bonds of Nature.**

Affection for the proviſion for the heirs males that one ſhall ingender, brotherly love, &c. are good conſiderations to raiſe a uſe; but long acquaintance and familiarity are not.

The ſon may maintain his Father, and one brother another.

Brothers or Coſins ſhall not wage battel in a Writ of Right.

A Statute that maketh it felony to receive or give meat and drink to one that committeth ſuch and ſuch an offence knowing it, ſtretcheth not to a woman that receiveth or giveth meat and drink to her husband in ſuch a caſe.

30. **The Law judgeth and eſteemeth of all according to their nature:**

ture: both persons and their ages: things, actions, and the time of the doing them.

In persons.

It looketh to the excellency of some, and giveth them singular privileges and preheminencies above the rest. as to the King, the Queen his wife, Noblemen, and Peers of the Realm. Also unto them of the Church.

It tenderth the weakness and debilities of others: As of

Men out of the Realm, or in prison, Femes Covert (and therefore favoureth them for their dowers) infants, men unlettered, Ideots out of their right mind, or without all understanding) as those that are born dumb, deaf, and blind, or having other imperfections.

If a disseisor die seised, the disseisee being all the while within age, Covert baron in prison or out of the Realm, it shall be no descent to toll the entry of the disseise.

Upon a Lease made to a husband and wife, she shall not be charged after the Husbands death, for waste done by him in his life time.

A woman shall be indowed of the best pos-

poſſeſſion of her husband: as if the huſband held of I.S. by iij d. who held over of another by xx d. and I.S. releaſe to the husband (ſo as now the husband holds by xxd.) the wife being endowed of this land, ſhall hold only by the third part of iij d. and not of xx d.

An Infant, Ideot, and a man of *non ſanæ memoriæ*, may enter, or have an action to avoid their feoffments.

If a dumb perſon bring an action, he ſhall plead by *prochein amy*.

31. Strangers not parties nor privies.

Leſſee for years grants a rent-charge, & ſurrenders, yet the rent ſhall be paid during the years. 1 *El.* 198.

So if he in the reverſion grant a Rent-charge during the term, and then the leſſee ſurrendreth unto him, he ſhall pay the rent during the term: for a ſtranger (that is, the grantee of the rent) for his benefit ſhall ſay, that the term continueth, and that it is determined.

And therefore

Things done in anothers right.

A perſon out-lawed or excommunicated may have an action as executor of another man.

And a villain in ſuch caſe againſt his Lord, for they recover not their own but to anothers uſe.

It

32. It disfavoureth other some.

Aliens neither born within the Realm, nor free denisens, that they shall not participate of the priviledges of natural born Subjects.

Especially aliens that are enemies.

Alien enemies shall not have so much as a personal Action, which other Aliens may.

An obligation made to an alien enemy shall go unto the King.

Any body may seise the goods of an alien enemy to his own use.

Touching their ages.

33. It holdeth.

xxi. Their full age to make good any act they do.

xiv. Their age of discretion.

And therefore

That a competent age to bind a man in matter of marriage.

xii. To bind the woman:

ix. To deserve her dower.

In

In things.

34. It reſpecteth every one according to worthineſs. As

Life and liberty moſt; the perſon above his poſſeſſions; freehold and inheritance more than it doth chattels; real chattels more than perſonal.

None ſhall have judgment to recover in an action of waſte, where the waſte cometh but to 12*d* or ſuch a petty ſum, for *De minimis non curat lex.*

A Leaſe for life, the remainder for years, the remainder over in fee; an action of waſte lieth for him in the remainder, againſt leſſee for life: for the mean eſtate for years is not regarded. Otherwiſe it were if the immediate eſtate of the remainder were an eſtate for life.

A villain infranchiſed for an hour, is for ever. So infranchiſed upon condition, the condition is void, and the infranchiſement abſolutely good.

If a man for fear and ſimplicity will confeſs himſelf guilty of a Felony, yet the Judge muſt not record that confeſſion, but ſuffer him to plead not guilty; and that is in *favorem vitæ.*

35. A matter in the right more than a matter in poſſeſſion.

In

3 *E.*3. 88. In avowry or annuity, aid ſhall not be of a perſon, if the Plaintiff be ſeiſed by the hands of the ſame perſon, becauſe it is of the perſons own wrong to deny it.

Otherwiſe in a *Ceſſavit*, for that is in the right for the land.

14 *H.*7. 5. *Reb.* In an action of Treſpaſs againſt tenant for life, who pleads villenage in the Plaintiff, and the Plaintiff is found frank and no villain, yet he in the reverſion is not eſtopped by this verdict: For the thing it ſelf whereupon the reverſion dependeth is not in demand, and the Plaintiff ſhall recover only damages: neither can he in the reverſion have a Writ of Error or attaint upon it.

Otherwiſe it is in a *Nativo habendo*: for there the right of villenage cometh in queſtion, and he in the reverſion may have an error or attaint.

Yet it favoureth

36. Poſſeſſion, where the right is equal.

A man purchaſeth at one time ſeveral lands holden of ſeveral Lords by Knights ſervice, and dieth: the Lord that firſt can hap the Wardſhip of his heir, ſhall have it.

8 *El.* 296. Husband and wife purchaſe ſocage land unto them and the heirs of their body, and having iſſue within fourteen years of age:

Now

Now if the Grand-mother of the part of the mother of the iſſue do firſt ſeiſe the body, ſhe ſhall have the Wardſhip, and not the Grand-father of the part of the father of the iſſue.

37. **Matters of profit, or intereſt largely: of pleaſure, eaſe, truſt, authority, or limitation ſtrict.**

A Licenſe to hunt in my Park, or walk in my Orchard, extends but to himſelf, not to his ſervants, nor other in his company, for it is but a thing of pleaſure, otherwiſe it is of a licenſe to hunt, kill, and carry away the Deer, for that is a matter of profit. 13 *H.* 7. 13.

Way granted to Church over my land, extends not to any other but himſelf, for it is but an eaſement. 12 *H.* 7. 25. *b.*

A reverſion granted to two joyntly, and the Tenant atturns to one, it is a void atturnment.

If the Sheriff behead one that ſhould be hanged, it is felony. 11 *H.* 7. 12. *b.*

The King licenſeth one to alien the third part of his land; and he alieneth all, it is a void alienation for all. 35 *H.* 6. 58. *b.*

A Leaſe is made to A. and B. for their lives, A. dieth, B. ſhall have all during his life, for it is an intereſt. 4 *E.* 6. 68. *b.*

But if a Leaſe be made to I. S. during the life of A. and B. there (if one of them dye) the eſtate is utterly determined, for that is a limitation.

38. There-

38. **Therefore these may be countermanded, so cannot those.**

9 *E.*4.4.*b.* A Licenſe to come to my houſe to ſpe
(*a*) 1 *E.* 5. 2. with me: (*a*) Goods bailed over, to deliv
(*b*) 28 *H.* 8. to I. S. or (*b*) to beſtow in alms (*c*): A lett
*Dy.*22. of Attorney to deliver ſeiſin: all th
(*c*) *Park.d.* may be countermanded before they
done.

14 *E.*4.1. But if I preſent I. S. to a Church, I ca
not after vary and preſent a new, fo
kind of intereſt paſſeth out of me.

Park. 19.*b.* So if I deliver an obligation as
ſcroll into a Strangers hand, to be de
vered to the Obligee, upon condition pe
formed, for the Obligee is as it were par
or privy to the delivery.

39. **Matters of ſubſtance more than matters of circumſtance.**

21 *H.*7. 24.*b.* Pleas in bar, and replications (thou
the Plaintiff be afterwards nonſuit) ma
an eſtopple, for they are expreſs alleg
tions and material. As in debt upon an o
ligation, if the defendant plead in bar
acquittance made at D. or if the defend
plead an acquittance, and the Plaintiff
ply, that it was made by dureſs of impriſo
ment at D. now in another action, neith
the Defendant ſhall plead that the acqui
tance, nor the Plaintiff that the dureſs w
at another place: But a matter in the w

or count, makes no eſtopple, for they are but ſuppoſals.

As in a formidon and claim by deſcent from *I.S.* or a mortdanceſter, as ſon and heir to *I.S.* yet in another formidon he may claim from *I.D.* and ſhall not be eſtopped.

No more ſhall recitals make any eſtopple, for they are not material. As where *A.* reciting that he is ſeiſed in fee of the Mannor of *D.* granteth a rent out of it to *B.* this ſhall not eſtop *A.* to ſay that he had nothing in the Mannor. 33 *H.*6. 10.*b.*

39. **Things executed and done more than things executory, and to do.**

A feme diſſeiſers taketh a husband, the diſſeiſee releaſeth to the husband, afterward a divorce is had for precontract: yet the releaſe remaineth good, becauſe it was executed. 32 *H.*8. *Br. Daretnement* 18.

A feoffment made to the uſe of ones will, if his will be declared before or at the time of his feoffment; it cannot be altered, becauſe it is executed. 20 *H.* 7. 11.

Otherwiſe it is of his will declared after.

Poſſibility of things.

And therefore

40. **Nothing to be void that by poſ-**

ſibility may be good.

15 *H.* 7. 10. — Lands given to a married man and another mans wife, and the the heirs of their two bodies, is a good eſtate in tail (and that preſently executed as ſome think) for the poſſibility that they may entermarry.

1 *H.* 4. 1. A meſſualty is given in tail, reſerving a rent, this is good: for the tenancy may eſcheat to the donee, and then the donor ſhall diſtrain for all his arrearages.

41 *E.* 3. 11. *b.* — A man hath iſſue a daughter, and leaveth his wife priviment inſeint: the wife may detain the charters of her husbands lands from the daughter, for the poſſibility that it may be a ſon that ſhe goeth withall.

42. A mutual recompence.

— An aſſumption or promiſe doth then only bind, when it is made upon good conſideration of another thing.

Ceſtui qui uſe may grant his uſe without conſideration, as he may his horſe or other chattel: but he cannot raiſe a uſe without good conſideration. And this conſideration muſt be ſome cauſe or occaſion meritorious, amounting to a mutual recompence in deed or in law.

A Writ of annuity ſhall be maintained by a Parſon againſt a Vicar, upon an Ordinance of the Ordinary, if there be *Quid pro quo*.

In

In Actions.

43. It yieldeth favour, when for the doing of it there is,

Neceſſity.

Funeral expences ſhall firſt of all be diſcharged by executors. *Br. executor* 172.

A man may milk a Cow that he hath by return irreplegiable. And that is for the neceſſity.

A man in his own defence for the neceſſity of the ſaving of his life, and a champion in a Writ of right for the neceſſity of trial, may Kill another. 4 *E.*6.19.

Whither refer

44. Conformity, which is a kind of neceſſity.

Rent muſt be demanded, though no man be upon the land to pay it.

Where an infant in ward marrieth himſelf, yet to have the forfeiture of the marriage, the Lord muſt tender him one. *Br. for. Mar.* 12.

He that pleadeth in the avoidance of a fine, That the parties to the Fine had nothing, muſt ſhew who had. 40 *E.*3.30.*b.*

But it is not traverſable, but only ſhewed for conformity.

45. Of colour.

41 *E.* 3. 28. If the heir endow the anceſtors wife, though ſhe were not dowable, yet ſhe ſhall hold in dower.

22 *Aſſ. pl.* 64. Where a Court hath no colour to hold plea (as a Court Baron of land not holden of the Mannor) all is void.

But where there is colour (as if a Court Baron hold plea of land within the Mannor) though it be by plaint, where it ſhould be by Writ original; yet the judgment rendred is only voidable by writ of Error.

A woman grants a reverſion, and marries with the grantee, if the tenant pay him the rent generally, it is no attornment: for he hath colour to pay it him, as ſeiſed in the right of his wife.

46. It prizeth acts in law higher than thoſe that are done by the party.

49 *E.* 3. 15. Upon the grant of a rent, the Tenant cannot attorn, nor put the grantee in poſſeſſion by an ox or ſuch like, becauſe it is another thing: but upon the recovery of rent, the Sheriff may.

Litlit. — Parceners may compel partition, ſo cannot Joyn tenants, nor Tenants in Common.

2 & 3 *P.* & *M*, 134. *b.* For equality of partition among Coparceners, a rent granted ſhall be a fee ſimple, without words (heirs) & iſſuing out of the lands, without ſo expreſſing it in the grant.

a. 2. *H.* 7. 5. Alſo things that otherwiſe cannot, may paſs

pass without deed, as a rent, reversion (b) 21 E. 3. 7.
seigniory, way, avowson, composition to (c) 11 H. 4. 3.
present by turn. (d) 28 H. 8. Ly. 29.

Parceners may have a *quare impedit* one against another (that is, the eldest daughter may have it against the rest, if she be disturbed of her presentment) Fitz. N. B. 34

So cannot Joyntenants, nor Tenants in common.

46. It reputeth that men will always deal for their own best advantage.

And therefore

47. Believeth against the party whatsoever is to his own prejudice.

For the time of doing things:

It countenanceth more

48. Things done in time of peace, than in time of war.

A disseisin and descent in time of war, Litt. 97.
shall not toll the entry of the disseisee.

Usurpation in time of war gaineth no 7 E. 3. *darrein*
possession, but the other may have an *assize* of darrein presentment (that notwithstanding) if his ancestor presented last before. *presentment* 2. Fitz. N. B. 31. I.

49. Things done in the day more than in the night.

1 *Mar.* 172. *b.* Rent payable at a day the party hath all the day till night to pay it: but if it be a great ſum, as 500 or 1000 *l.* he muſt be ready as long before the Sun ſet, as the money may be told: for the other is not bound to tell it in the night.

A man muſt not diſtrain in the night time for rent behind. [redacted]

Where things are fit to be ſtraitned to a time, it eſteemeth (according to the nature of the things.)

50. Sometimes a whole day ſufficient.

Where goods are loſt in war, and recovered from the enemy by another of the Kings ſubjects, the owner ſhall have them again, if he make freſh ſuit before the Sun ſet, elſe not.

51. Sometimes a whole year.

The Lord loſeth his villain for ever, if a villain flee into ancient demeſn, and there continue a year and a day, without claim of the Lord.

Recovery in a Writ of right, and fines executed, bind all perſons though they have right, that lay not to their claim within a year.

The

the King cannot grant a protection to endure longer than a year.

52. **The third offence it esteemeth more heinous.**

The third Writ not returned by the Sheriff, is a contempt, whereupon an attachment lieth.

Political precepts follow.

The Law favoureth

53. **Things for the Commonweal.**

A man may justifie the doing of a wrong in things that sound for the Commonweal. 29 *H* 8. *Dy.* 36 *b.*

As in time of war; to make Bulwarks in another mans soyl without licence. To raise ones house on fire, in safegard of the neighbours houses.

A Sheriff may break open the doors of ones house to take a felon. But not to serve a *Capias* in an action of Debt or Trespass: for that is a particular case, and not for the Commonweal.

Fishermen may justifie their coming upon the land adjoyning to the sea, to dry their nets: for fishing is for the Commonwealth and sustenance of all the Realm. 8 *E.* 4. 18. *b.*

A millstone that is lifted up to be picked and beaten, cannot be distrained, for it 14 *H.* 8. 25.

remains parcel of the mill, which is a thing for the Commonwealth.

22 *E.*4.49. Things brought into an Inn or Fair, or Market; or cloth lying in a Taylors shop, or a horse that is a shoing, shall not be distrained.

Publick quiet.

And therefore

54. Common error goeth for a Law.

2 *R.*3.7. An acquittance made by a Mayor, in his own name only (where the Town is incorporate by the name of Mayor, Sheriff, and Burgesses) shall be allowed for good, if there be an hundred precedents and more of like acquittances. And that is for common quietness.

Mawth cast. f. 2. Whether a common recovery be a Bar unto an estate tail or no, is not to be disputed, because a great part of the inheritance of the Realm doth depend upon it.

Of this kind are those Oeconomicks.

The husband and wife are one person.

And therefore

The wife is of the same condition with her husband.

Frank

Frank, if he be free, Denison if he be an Englishman, though she were a neif before or an alien born. *Fitz. N.B 78. Abridgment of assiz. per Br. denisen 2.*

55. They cannot sue one another, or make any grant one unto the other, or such like.

If the (a) woman marry with her obligor, the debt is extinct, and she shall never have action against the Co-obligor (if another were bound with him) because the suit against her husband by enter-marriage was suspended. And therefore being a personal action, and suspended against one it is discharged against both. (a) 21 *H.* 7. *b.* 29.

So if a feme sole bail goods to one, and marry with the bail.

Likewise the husband cannot inseoff his wife, but upon a feoffment made unto her by a stranger, he may deliver seisin unto her by letter of attorney; for thereby himself giveth nothing. *Park.* 40.

56. Upon a joynt purchase during the coverture, either of them taketh the whole.

If the husband alien land, &c. so given she shall recover the whole, in a *Cui in vita* after his death, and the warranty of one of them or his ancestors, is a bar of the whole against them both. 39 *H.* 6. 45. 21 *R. jud.* 63.

And if a feoffment be made to the husband and wife, and a third person; the third *Littlet.* 65.

third person taketh one moiety, and the husband and wife the other moiety.

The husband is the womans head.

And therefore

58. All she hath is her husbands.

— The personal things she hath are meerly his: but real things, whether land, rents, &c. or chattels real, and things in action he hath only in her right: yet so as of real chattels and things in action, he may dispose at his pleasure, and shall have the real chattels if he overlive. Of things in action her self may dispose by will.

Litt. 1.148. If Tenant in tail enfeoff a woman and die, and his issue within age take her to wife, he shall be remitted, and the woman now hath nothing: for he cannot sue any formedon in this case, unless he will sue against himself, because by the entermarriage himself is seised in her right.

14 *Eliz. Ploy.* 418. — If one that hath a lease for years, grant his term to a feme Covert, and another, or if a feme soul and another be Joynt tenants for years, and she take a husband, yet the estate of the feme and joynture doth continue so as the survivor of the wife, or of the other shall have the whole: and if a stranger oust them, her husband and she must joyn in an *ejectione firmæ*, and the feme shall have judgement as well as the husband:

husband: And (*a*) in pleading he may say, That they are poſſeſſed in her right. Neither can the husband, where the wife hath a term for years, either deviſe it to another by his will (for ſhe hath an eſtate in it before and at the time of his death, which preventeth the deviſee) or grant a rent-charge out of it, for ſhe ſurviving is remitted to the term, and therefore ſhall avoid the charge, but by an expreſs act he might in his life time have given it away. But if a woman having chattels perſonal take a husband, the law diveſteth the property out of her, and veſteth it in her husband only.

(*a*) 1 *Eliz. Ploy.* 91.

14 *Eliz. Ploy.* 419.

14 *Eliz. Ploy. Ibid.*

And if goods be given to a feme Covert, and another, the joynture is ſtreight way ſevered, and the husband and the other are Tenants in common; and the executors of the husband ſhall have all the goods that were his wives.

—

11 *H.* 7. 27.

But in an action of debt upon arrerages of an accompt (where one was receiver to the feme whilſt ſhe was ſole) they both muſt joyn, and that although the auditors were aſſigned during the coverture; for the very cauſe of action, that is, the receipt (whereunto the aſſignment of auditors is but a thing purſuant) was in her right; yet the husbands releaſe of an obligation made to the feme, or where goods were taken from her whilſt ſhe was ſole, ſhall be good againſt the wife if he dy. But if he dy without making ſuch a releaſe, the wife ſhall

16 *E.* 43.

7 *H.* 6. 1.

—

ſhall have an action upon the obligation and not the Executors of the husband
39 *H.* 6 27. Likewiſe the Wife ſurviving, or her executors if ſhe dy, ſhall have thoſe things in action, and not the husband; or ſhe may make her husband her executor, and the
1 *El. Ploy.* 191. he ſhall recover them to her uſe. But leaſe for years, which the wife hath, ſhall be the husbands, if ſhe dy before him: for that is a thing in poſſeſſion and not in action.

59. **Her will is become his will, and ſubject unto it.**

Upon a feoffment to a feme Covert ſhe taketh nothing, unleſs her husband will agree; and where one is bound to enfeoff the husband and wife, the husband's refuſal is the refuſal of them both; but where the husband and wife are joynt purchaſers, the husband may make a feoffment and livery upon the land, which ſhall work a diſcontinuance, though the wife be in preſence upon the land, and will not agree. If they bargain and ſell the wife's land by Indenture, and the vendee grants unto them for the ſame a yearly rent, the acceptance of this rent after her husband's death, doth not bar her of the land, although the acceptance be an agreement to the bargain, but the bargain being but a contract, is the bargain of the husband only, and not of the wife: if ſhe make

a releaſe, obligation, or ſuch like, it is meerly void. If both her husband and ſhe bail goods to one, they ſhall not joyn in an action of detinue, for it is only his bailment, and void as unto her. In an accompt upon a receipt, by the hands of the Plaintiffs wife, the defendant may wage his law; hereupon it is that the wife can never anſwer in any action without her husband. And if in an action of Treſpaſs againſt them, the wife come in by *capi corpus*, and the husband doth not appear, ſhe muſt be let at large without any mainpriſe till her husband do appear; but he appearing, may anſwer without her, therefore a protection caſt by the husband ſerveth for the wife alſo, becauſe ſhe cannot anſwer without him.

Laſt come the Moral Rules.

60. **The Law favoureth right.**

When two are in a houſe, or other tenements, and one lay claim by one title, the other by another title, the Law adjudgeth him in poſſeſſion that hath the right to have the tenements. *Littlet.* 158.

And therefore

61. **Suffereth things againſt the principles of Law, rather than a man to be without his remedy.**

4. 7. 40. A Man that is outlawed may bring a action to reverse it, and outlawry there no plea.

F.N.B. 69. *b.* The Tenant shall have a replevin a gainst the Lord that did wrongfully d strain, though the beasts be come back t himself, because he can have no action o trespass against him.

11 *H* 7. 10. A man (after that judgement is passe against him) shall plead against the King Charter of pardon, or any such thing don mean betwixt the verdict and the judge ment, because against the King he ca have no *Audita querela*. Otherwise it is gainst a common person.

Hateth wrong.

So that

62. No man shall take a benefit of hi own wrong.

31 *H.* 6. *bar.* 60. A man is bound to appear before th Justices at a certain day, at which day h is in prison at the parties suit, so as he ca not come, the bond is saved. Otherwise i is, if he were in prison for felony, or an other misdemeanor, for that is his ow fault.

27 *H.* 8. 11. & *Br. Covert.* 2. An Infants appeal shall not stay till hi full age, for the defendant shall not hav advantage of his own wrong.

13 *H.* 7. 1. One in execution scapes, and the Goale

get

gers him again, the party if he will, may have him to remain in execution for him ſtill, for the eſcape is his own wrong.

And therefore,

63. Of it ſelf prejudiceth no man.

If a feoffment be made to two joyntly, one of them cannot deraign the warranty without the other. Yet if a villain and another purchaſe joyntly, and the Lord of the Villain enter into a moity, he may deraign the warranty alone, for his moity: for there the ſeverance groweth by act in law. 48 *E.* 3. 17.

He that miſdemeaneth authority, that law giveth him (as if one come into a Tavern, and will not go out in ſeaſonable time; or diſtrain for rent, and kill the diſtreſs) Shall be a wrong doer *ab initio*. 12 *E.* 48.

Otherwiſe it is, if he miſdemean an authority that another giveth him. As if I lend my horſe to one to ride to *York*, and he ride further, yet the riding to *York* ſhall not be unlawful. Nor a general action of Treſpaſs lieth not againſt him upon an accord upon the caſe.

Eſpecially for things that cannot be imputed to his own folly.

The Lord Chancellors ſervant impleaded at the common law claimeth priviledge of the Chancery; and before it be diſcuſſed 35 *H.* 6. 3.

ſed whether he ſhall have it or no, th
Lord Chancellor dyeth; yet his priviled
is allowable ſtill, for the act of the Cour
to adviſe of it, ſhall not prejudice him.

33 *H.* 8. *Br.* Of rent a man ſhall have an ejectmen
of ward before ſeiſin: for the law coun
eth him in ſeiſin, in as much as he canno
have it before the day. Otherwiſe it is o
land.

And therefore

**64. Diſbeth not a man to ſhew that whic
by intendment he knoweth not.**

2 *Mar.* 128. A man may plead that he was choſe
Knight for the Shire by the greateſt num
— ber, without ſhewing the number: fo
the election may be by voices, or hands
or in other ſort; hard to diſcern the cer
10 *E.* 4. 15. tain number, and yet eaſie to ſee who ha
the greater number.

— One bound in an obligation to ſerve *I. S.*
for ſeven years, *in omnibus mandatis ejus
licitis*, ſhall plead that he did ſerve the
lawfully, without ſhewing what ſervice o
4 *E.* 6. 46. in what commandment: for no ſervant ca
remember all.

— A man may averr a thing to be done b
covin, without ſhewing how the covin wa
for covin is a ſecret thing contrived be
tween two or three, to the prejudice of a
nother.

Tenth

Truth.
And therefore,

65. It disadvoucheth
Fraud and covin.

If a woman that hath good title of Dower, cause I. S. to disseise the tenant of the land, and recovereth her dower against I. S. yet this is no good estate of dower in her, for she is privy to an unlawful act, which should be the means of her estate. 18 H.8. 5.

66. Uncertain, whereby truth is invaigled.

A man grants all his trees and wood upon Bacre, that may reasonably be spared; this is a void grant, unless it be referred to a third persons judgement, what may be spared. 1 Mar. Dy. 91 —

If two several Writs of one self same thing, against one self same man, be returned at one self same time, both shall abate. Manxels case. fol. 10. b.

67. Variance.

If the Writ vary from the obligation or other specialty in name, firname, or such like, in an action of debt or annuity brought upon it; or the Count vary from the Writ, as in an action of debt of xx l. and declare but a debt of x l. both shall abate. 11 E. 4, 2. — 8 E. 4, 2. b.

(a) 4 *ass. pl.* 2.
(b) 32 *H.* 6. 3.
(c) 7 *H.* 6. 22.

An (a) essoyn or (b) protection varying from the original Writ in the quantity of the Tenency, or the name of the party, shall be quashed: and the Chancellors servant bringing a Writ of priviledge varying from the original Writ (as if the original be a Writ of trespass, and the priviledge in *placito debiti*, or the original an action of Debt of 44 *l.* and the Writ of priviledge in *placito debiti* of 42 l.) it shall be disallowed.

Departure also, when one fortifieth not the matter of his plea that went before, but cometh in with a new matter, is a kind of variance, and maketh the plea naught. As if the rejoynder be a matter puisne underneath the matter of his bar, and not above, and going before it: As in an action of Trespass, the defendant pleadeth a descent unto him of the land, the plaintiff saith, that after the descent the defendant infeoffed him: Now if the defendant rejoyn, that the feoffment was upon condition, and he entered for the condition broken; this is a departure: for the matter of the bar (that is, the descent) is before the matter of the rejoynder, that is to say, the entry for the condition broken, whereby the feoffment is avoided. So if in an assize the defendant pleadeth the feoffment of I. S. and the plaintiff make title to himself by descent, and that he was disseised by I. S. who infeoffed the defendant; or that he infeoffed I. S. upon condition, who brake the condition, and afterwards

terwards inſeoffed the defendant; &c. Now if the defendant ſay, that after the diſſeiſin (or condition broken) and after the feoffment of I. S. to the defendant, the plaintiff did releaſe to the defendant, or confirm the ſtate of the defendant, this is a departure; for that is a matter that groweth after the feoffment pleaded in bar. But if he plead ſuch a releaſe or confirmation from the plaintiff to I. S. that is no departure; for it is a matter before the feoffment, or in an action of treſpaſs for goods, if the defendant entitle himſelf by the gift of I. S. and the plaintiff ſaith that himſelf was poſſeſſed till I. S. took them from him and gave them to the defendant. Now the defendant may ſay, that after the taking, the plaintiff gave them to I. S. who gave them to the defendant: For although the defendant might have pleaded theſe things at the beginning; yet, in as much as it is purſuing, and fortifieth his bar, and no puiſne matter underneath the title of his bar, but eigne, and above the matter of his bar, therefore it is no departure. So a plea in a bar which is intendible at the Common Law, cannot be maintained by a matter of cuſtom, or by Statute Law. As in an aſſize the tenant pleadeth in bar a deviſe unto himſelf of the land, being deviſable by the cuſtom: the plaintiff ſaith, that the Deviſor was within age at the time of the Deviſee. Now if the Tenant ſay, that by the cuſtom there, an Infant

of fifteen years of age may make a deviſe: this is a departure. For the cuſtom pleaded in bar ſhall be intended of thoſe that may make a deviſe by the Common Law. So if in an action of treſpaſs the defendant plead in bar a releaſe for fifty years from a houſe of Religion, and the plaintiff avoid it, by reaſon it was made within a year before the diſſolution, and ſo void by the Statute 31 *H.* 8. Now if the defendant will alledge, that by the ſame Statute it is provided, that all ſuch leaſes ſhall be good for xxi years, and ſo maintain the Leaſe to be good for ſo many years, this is a departure. Or if one plead a Fine, and that being avoided becauſe the parties to the fine had nothing, will maintain the Fine to be good by the Statute 11 *R.* 3. becauſe he that levied the Fine was *Ceſtui qui uſe*.

68. **Contrariety.**

21 *E.* 4. 36. An Obligation is made *ſolvendum nunquam*. This *ſolvendum* is void, and the thing preſently due.

4 *E.* 4. 29. *A.* is bound to *B. Solvendum eidem A.* This is a good Obligation, and the *Solvendum* void: for the plaintif may declare upon a *Solvendum* to himſelf.

11 *H.* 7. 21. *b.* In a treſpaſs *de domo fracta & muris ejuſdem domus fractis.* The defendant cannot plead not guilty to the breaking of the houſe, & juſtifie the breaking of the walls: for

for the house and walls are all one, and he cannot of the same thing both justifie and plead not guilty: for by the justification, he acknowledgeth himself guilty. So one is contrary to another.

A Feoffment in fee is made of two acres, unto two men *habendum* one acre to one man, and the other acre to the other man. This is a void *habendum*: for the premisses give him an interest through both acres, and the *habendum* excludeth him from having any thing to do in one. 2 & 3. P. & M. 153.

A lease of a Manor excepting the services, the exception is void; for it is parcel of the thing let.

And therefore

69. It will not binde a man to justifie that he goeth about to defeat.

He that bringeth an assize of the mastership of a Chappel against I. S. shall not need to name I. S. the master of the Chappel, because the plaintiff is to disprove his interest. 10 H. 7. 9.

Diligence.

And therefore

70. It hateth
Folly and Negligence.

After a recovery in a Writ of right, if a stranger that hath right, lay not to his claim within a year and a day, he is barred: 5 E. 3. 222. *Heris.*

for ever. For *vigilantibus & non dormientibus jura subveniunt.*

Lit. 95. A descent cast during the coverture (where the wife is disseised) barreth her not of her entry after the husbands death. But if a feme sole be disseised, and then taketh a husband, there a descent during the coverture taketh away her entry: for it was her folly to take such a husband that entered not in time.

Spreding of mens causes.

And therefore

71. **It hateth Delays.**

3 *H.* 6. 15. *b.* He that pleadeth a Record in delay (as to prove the plaintiff excommunicate) must have it ready to shew. Otherwise it is, if he plead it in bar.

12 *H.* 7. 3. In dilatory pleas both defendants must joyn.

8 *H.* 7. 9. A plea in bar that is dilatory, must be good to every common intent.

72. **Unnecessary circumstances,**

2 *H.* 6. 1. *b.* One that is in Court ready to joyn with the defendant, may do it without Process. As the vouchee the Plaintiffs lessor being prayed in aid of, when the def. in a replevin avoweth upon him, or the mesne when the Lord paramount avoweth upon him: But joynder in aid cannot be by Attorney without Process.

One

One that is a debtor to the King of Record in the Exchequer, if he be seen in the Court, may be brought in to answer without Process. 1 *H.* 6. 4. *b.*

73. **Circuit of action.**

When a father infeoffeth his son and heir with warranty, and dieth; Now the son in a *præcipe* brought against him, may vouch the feoffee of his father: for the Law will not suffer to vouch himself, and when he cometh in as vouchee, then to deraign the first Warranty for the circuit of vouchee. *Manxels case. fol.* 7. *b.*

Upon the grant of a Ward with warranty, the defendant in a Writ of Right of Ward may rebutt the plaintiff by that warranty, and shall not be driven to bring an action of Covenant for avoiding circuit of action.

So in an action of waste upon a Lease for years by deed, and in the same deed the lessor granteth to the lessee, that he shall not be impeached of waste, the lessee may plead this in an action of waste.

The Law construeth things with equity and moderation.

And therefore

74. **Restraineth a general act, if there be any mischief or inconvenience in it.**

Tenant for life lets to another for life *Lit.* 120.

without expressing whose lives, it shall be taken for the lessors own life; for else it were a forfeiture of his estate.

A house that hath Copyholds and other lands usually occupied with it, is lett for years, with the lands appertaining; yet the Copyholds pass not without special naming: for then it were a forfeiture of them.

A Corody granted to one and his servant to sit at his Mess, he cannot bring a servant that hath some filthy or noisom disease.

Estovers granted out of a Mannor, the grantee shall not cut down fruit trees.

A Common granted to one for all his beasts, yet he shall not have Common for Goats, nor Geese, nor other beasts, not Commonable.

A feoffment of all his lands in the town of D, with Common *in omnibus terris suis*, this Common shall be intended in D only, and not elsewhere.

75. Moderateth the strictness of the Rule it self.

By abridging, diminishing, and taking away the severity of it, and mollifying the hardness thereof. A moral vertuous *Camden* calleth, and may appear by *Aristotle*, who treating of it, defineth it, *A certain correction of the Law, wherein it is any way wanting, because of the generality of it.*

It

It is no treſpaſs for a man to beat his Apprentice, which is reaſonable correction.

No more is it to carry away a mans wife againſt his will, to a lawful end. As to ſue a divorce againſt her husband, or to have the peace of him before a Juſtice of peace.

A great part of the depth and learning of the Law (if you go to the primitive reaſon of it) ſtandeth upon this and that other kind of equity that went before. Of both which *Plowden* in that caſe diſcourſeth at large, and well ſetteth forth the nature of them, ſo far as concerneth the interpretations of Statutes. But they have a further and more ſhining uſe in the expoſition of Common Law it ſelf, as in the caſes before put.

To the beſt.

And therefore

76. Every act to be lawful, when it ſtandeth indifferent to be lawful or not.

If the Leſſor come upon the ground, it ſhall be intended, that he came to ſee if waſte were done.

If the diſſeiſee come, it ſhall be taken that he meant to be remitted.

In an action of Treſpaſs, two iſſues are joyned triable in two counties, one in *London*, another in *Middleſex* only (without ſaying which of the iſſues it ſhould try;) this ſhall be taken to try the iſſue in *Mid.* only: for ſo the *venire facias* is lawful, and not 11 *H.* 7. 5.

not in both counties, which is against law. And therefore it is a discontinuance of the issue in *London*, and not a miscontinuance.

CHAP. IV.

Of Law constructions that are natural.

Thus far of Rules drawn from other Sciences. There follow those that are proper to our selves, which we call Law constructions. And are natural or feigned.

Of the first sort we have two notable grounds.

Law construeth things
Reasonably.
And therefore
77. With a reasonable intent.

A feoffment by deed of a Mannor, with avowson appendant, and no livery made, the avowson passeth not: yet they may pass without livery, but the meaning was, the mannor and it should pass together.

A bargain and sale of land, and a reversion by deed not inrolled, the reversion passeth not no more than the land, though the deed without inrolment may pass the reversion:

reversion: but it was meant they should pass together.

One reciting by his deed, that where by prescription he hath used to find a chaplain, because some controversie hath grown of it, granted by the same deed to do it; this determineth not the prescription, for the intent of the deed (reciting the prescription) was to confirm it, and not to make a new grant. 21 H. 7. 5.

78. According to the effect.

A deed delivered by an infant, cannot be delivered again at his full age: for it took some effect before, and was but voidable. 1 H. 6. 4. —

But a deed delivered by a feme Covert, or a release delivered to one that hath nothing in the land, may be delivered again (viz.) when she cometh to be sole, or the party to have somewhat in the Land: for the first delivery was meerly void, and took no effect at all. —

So that

79. He that cannot have the effect of a thing shall not have the thing it self. —

The King shall not be received upon default of Tenant for life, because the demand cannot have the effect of the receit, viz. to count against him; which none can do against the King, but to sue him by petition. 4 Eliz. 241.

Two Abbots cannot be Joyntenants: for Lit. —

for they cannot have the effect of it, which is survivorship.

80. To the most validity.

Litt. 140.*b.* Tenant in tail makes a lease for life, this shall be intended the Lessees life.

An annuity granted *pro consiliis impendendo*, or a feoffment *ad eruditendum filium*, or *ad solvendum* 10 *s.* is a condition, without words conditional, because else the party hath no remedy.

And therefore,

81. When many joyn in act, it maketh it his act that may do it.

2 & 3 *El. Dy.* 191. A use limited to begin when ones eldest Son is married by I. S. the Son (being in ward to the King) is married by the King and I.S. yet no use riseth, for it is the sole marriage of the King.

A Patron of a Church suffereth a usurpation of six months, and then grants an annuity to I.S. till he do promote him to a benefice. After he and the usurper joyn in a presentment of I. S. yet the annuity is not determined.

Littlet. The Disseisee and the heir of the disseisor, in by descent, make a feoffment by one deed and Livery; this is the feoffment of the heir only, and confirmation of the disseisee.

82. When

82. When two titles concur, the beſt is preferred.

One is diſſeiſed, and the diſſeiſor lets the land to the diſſeiſee for term of years, or at will: now if he enter, the Law ſhall ſay, he is in of his ancient and beſt title. *Littlet.*

83. Things to be done by him that hath moſt skill to do them.

An Obligation upon condition, that a Bell ſhall be brought by the Obligee, to the Obligors houſe (being a Brafier) and there weighed and put in fire: and then the Obligor to make a Tenor of it, tunable with other Bells. 9 *E.*4.4.

The Obligor muſt weigh it, and put it in fire (not being expreſſed who ſhall do it) for it belongs to his office, and therefore he hath moſt skill to do it.

So upon condition that the Obligee ſhall bring to the Obligors ſhop (being a tailor) three yards of cloth which ſhall be ſhapen, and the Obligor to make the Obligee a gown of it: the Obligor muſt ſhape it.

A Merchant agreeth with the Kings collectors, that his Merchandize ſhall be weighed at the Kings beam, and the King ſhall have his ſubſidie as it riſeth, the Collector muſt weigh it. 4 *E.*6.17.

Iſſues joyned muſt be tried by them that have moſt skil (*videlicet*) An iſſue upon the 4 *El.*230. *b*

the law, by the Justices learned in the law.

Littlet. 21. Attendance upon the King (Scotland excepted) in war xl. days (as tenant by escuage must) by certificate of the Kings Marshal.

11 E. 4. 3. 6. Disseisin of an office in the common-place, or raising of a Record there, by the Filizers and Attornies, attendant in that Court.

84. Void things good to some purpose.

1 & 2. P. & M. 107. Lessee for twenty years takes a Lease for x years (to begin presently) upon condition if such a thing be not done, to be void, though the second lease be void upon the condition broken, yet the surrender remaineth good.

10 H. 7. 22. A feoffment upon condition to be void, as if it had never been, yet the feoffee shall have an action of Trespass (after the feoffors entry for the condition broken) for a trespass done by the Feoffor before.

85. One thing to enure as another.

21 H. 7. 13. The King grants to a Town *easdem libertates quas London habet*, it shall be intended the like. The lessor enfeoffeth his Lessee for life, by *dedi & concessi*, this shall enure as a confirmation.

25 H. 7. 7. One grants the third presentment to an advowson, and dieth, his heir shall present twice, and his wife shall have the third for her dower, and so the grantee shall have

have but the fourth.

The King pardoneth one the making of a Bridge; this is only good for the fine: but yet he must make the Bridge, because the Kings Subjects have interest in it. 37 H.6.4.

86. In one thing all things pursuant to be included.

One makes a Lease, excepting a close, wood, &c. now the Law giveth him a way to come to it. 14 H.8.1.

Where the King is to have mines, the Law giveth him power to dig in the Land. 10 E.317.

Upon a grant of Trees, the Grantee may come upon the land to cut them down, and with his carriage to carry them through the land. And the Vendee of all ones fishes in his pond, may justifie the coming upon the banks to fish, but not the digging of a trench to let out the water to take the fish, for he may take them by nets, and other devises. But if there were no other means to take them, he might dig a trench. 2 R.2. bar.397.

87. Strongest against him that doth them.

Two Tenants in common grant a rent of twenty shillings, the grantee shall have forty shillings. But if they reserve twenty shillings upon a lease, they shall have only one twenty shillings. 2 & 3. P. & M.140.b. & 161.b.

One

2 *M.*104. One bound to pay I.S. twenty pound *citra festum natalis domini*, it is no plea to say he hath paid it, but he must shew when, else it shall be taken he paid it after the feast.

And therefore

88. A man shall not qualifie his own act.

21 *H.* 7. 23. *b.* The obligee releaseth his debt till *Michaelmas*, the debt is gone for ever.

18 *E.*3. *Var.* 53. A reversion of three acres of land is granted, the tenant attorns for one, it is a good attornment for all.

17 *El. Dy.*339. A parson makes a Lease for 21. years, the Patron and Ordinary confirm it for xx. This is a good confirmation for the whole xl. years.

The construction, which otherwise law would make, is altered by the parties,

89. **Special agreement.**

40 *E.*3.5. Lessee for years is excused for waste, if the houses be blown down by sudden storm or tempest. But in that case if he covenant to keep reparations, an action of Covenant lieth against him.

Park. 55. *f. &* 56. *g.* Two Joynenants exchange an acre of land with another, they should hold the land taken in exchange joyntly. But if they exchange to have that acre in common between them, they shall be Tenants in common.

90. **Spe-**

90. Special words.

A leaſe reſerving a rent, the heir of the leſſor, after his death, ſhall have the rent: otherwiſe, if the leaſe be reſerving to the leſſor. 27 H.8.19.

A feoffment in fee to one and his heirs with warranty to the feoffee. This warranty goeth not to the heir. 30 H.8. Dy. 42.b.

91. Surpluſage of words.

The Ordinary may refuſe him generally, that demands his Clergy without ſhewing cauſe. But if he ſhew cauſe, which our law alloweth not (as becauſe he hath not his *tonſure* or *ornamentum Clericale*, &c.) he ſhall pay a fine, and yet be driven to take the Felon. 9 E.4.28.b. Lit.

In a *valore maritagii*, and count of a tender of marriage to the def. The tender is traverſable, if it were not before. 9 El. Dy. 255. b.

An information upon a ſtatute made ſuch a day, and the day miſtaken, is naught, though he need not to have recited the day. 6 E.6.84.

In an action of debt by I. S. Parſon of D. no ſuch Town as D. is a good plea: yet he needed not to have named himſelf parſon of D.

A writ of forging *diverſa facta & munimenta*, and count but of one; the Writ ſhall abate: yet he needed not to have ſaid in his Writ, but only *factum*.

CHAP. V.

Of Fictions in Law.

A Feigned construction, which we call a fiction in law, is when in a similitudinary sort the law construeth a thing otherwise than it is in truth. And is of the person, thing, action, and the circumstances thereof, time and place.

Of the Person.

92. Things done by another are as if they were done by ones self.

27 *H.* 8.24. A promise to ones wife in consideration of a thing to be performed by the husband, if the husband upon his coming home agree, and perform the consideration, she may plead this promise to be made to himself.

If my servant sell my goods, and I agree, I shall have an Action of Debt, supposing he bought of me.

25 *El. Earl of Leic. c.* A lease for years is made, and a letter of Attorney to deliver possession to the lessee: if the Attorney deliver possession to the Attorney of the Lessee: it is a good possession, and pursuing to his authority.

Of

Of the thing we have these two rules.

93. A thing that cometh in lieu of another to be as if it were the same.

One shall recover in value against the heir (upon the ancestors warranty) lands which the heir took in exchange for lands descended. 18 *H.3.rec. va.* 26.

A Mannor is given by fine, a *Scire facias* lieth of a Tenancy that afterwards escheated. 48 *E.3.*11.

If a Mannor descend to an heir within age, and after a tenancy escheateth, he shall have his age of it in a *Præcipe* of the Mannor; it shall be assets by descent, & he may vouch of this tenancy by reason of a warranty made of a Mannor; for the tenancy cometh in lieu of the services. 6 *H.*4.1.

94. A thing to be all one with that whereunto it doth amount.

The maxim of a Bastard eigne is, that the *mulier puisne* must make an entry upon him, or else he gaineth the right: yet a continual claim made by the *mulier puisne* destroyeth his right: for it amounteth to an entry. 14 *H.*4.9.

A Lease for a thousand days, is a lease for years. 14 *H.*8.13.

A lease for years and a release amounteth to a feoffment. *Brook.*

If a man license one to occupy his land for 5 *H.*7.1.

for a year. This is a lease for a year.

And therefore

95. A thing that should not be done, to be as if it were not done.

18 *El. Dy.* 36. One grants a rent-charge, without saying *pro se & hæredibus*, and dieth. The grantee brings a Writ of annuity against the heir, and hath judgment to recover: yet he may distrain afterwards: for the heir was never chargeable. So that upon the matter, it makes no election.

20 *El. Dy.* 362. A man makes a lease for years of a house with certain implements, reserving a rent, the Executors after the Testators death receive the rent, yet it is no assets in their hands: for the whole rent belongeth to the heir.

96. So of a thing done in a time that it should not.

1 *E.* 6. *Br.* 18. A man seised in fee, lets for ten years, & after selleth the land, and taketh it back to him and his wife, & then the husband and wife lett it for twenty years, reserving a rent: the husband dieth, the wife accepts this rent during the first ten years. By this the second lease is not affirmed, for the acceptance of a rent before the lease beginneth, and so before any rent be due, is no acceptance at all.

21 *El.* 563. A matter pleaded or disclosed out of time and course, is as if it were not pleaded at all,

all. As if one bring an action of debt upon an obligation, and count that the defendant was of full age at the time, the defendant ſhall not traverſe this; but only ſay he was within age, and the traverſe muſt come of the plaintiffs part.

To the circumſtance of time theſe two rules pertain.

Priority of time is imagined in things,

97. **Done together.**

One deviſeth a term for years to his ſon, and that the wife ſhall have it during the ſons minority. This is firſt a deviſe to his wife, and after to the ſon when he cometh of full age. 21 *El.* 540. —

One grants his reverſion of lands, and by the ſame deed granteth a rent out of theſe lands to another, and delivereth the deed to both at one ſelf ſame time. Yet it ſhall inure firſt as a grant of the rent to the one, and then as a grant of the reverſion to the other. —

98. **Happening in an inſtant.**

A meſualty deſcends to the Tenant of the land, though the meſualty be at the ſame inſtant extinct, yet the tenant ſhall pay relief if he be of fullage, or be in ward, if he be within age (*viz.*) where it is holden by Knights ſervice. 11 *H.* 7. 11.

Land is given to *A.* for the life of *B.* the remain- 7 *H.* 46. —

remainder to the right heirs of B.A. dieth, the remainder takes effect before any occupant.

9 E. 4 1 A man exchangeth land for a rent-charge out of the same land. This is good enough though they be in an instant (whereby the rent should be drowned in the land) for the law accounteth the exchange of the land to be first perfected.

95. Things relating to a time long before, be as if they were done immediately from that time.

Lit. 92. When the wife is endowed by the heir of her husbands lands, she shall be said to be in immediately from the husband. And therefore if the husband were a disseisor, and the heir in by descent, yet the disseisee may enter upon the wife.

36 *H.* 6. 7. Goods taken out of the possession of an executor who refuseth, and administration is committed to I.S. I.S. may have an action of trespass, supposing they were taken out of his possession: for he shall be said an Administrator from the very time of the death of the intestate.

These rules of common reason do many times cross and encounter one another, which is the greatest difficulty that we find in the arguing of our cases. But to help this, the general ground is according to the former rule ( ) that

100. Those

100. **Those prevail that carry the more excellent and perfect reason with them.**

Tenant for life makes a leaſe for life without naming whoſe life, this ſhall be intended for his own life (Rule 74.) for elſe it were a wrong. But if a tenant in tail make ſuch a leaſe for life, this is a diſcontinuance, and for life of the grantee (Rule 86.) for it is ſtrongeſt againſt the grantor, and moſt beneficial for the grantee. *Lit.* 110. *b.* *Lit.* 140. *b.*

Things executed where the husband is ſeiſed in the right of his wife, ſhall not be avoided by divorce: as waſte committed, receit of rent, wards, or preſentments that have fallen, gifts made of the wifes goods, &c. Rule 39. But otherwiſe it is in matters of inheritance, as if the husband diſcontinue and charge the wifes lands, releaſe or manumiſs villains, &c. Rule 30. 32 *H.* 8. *Br. Der.* 18.

A feoffment is made with warranty, the feoffee dieth having iſſue two daughters, who make partition of the land. This warranty ſhall be divided, notwithſtanding the partition which is their own act, and therefore not ſo much favoured, Rule 46. For the land cometh to them originally by act in law, that is by deſcent, Rule 5. 28 *E.* 3. 20. *b.* *Br. gar.* 27.

If the Chancellor die before his ſervants priviledge diſcuſſed in bank, yet it ſhall be allowed, notwithſtanding the cauſe of his priviledge now be gone. (contrary to Rule 3.) But the reaſon is, for that once he had cauſe: and the act of a third Perſon (that is to ſay the Court) ſhall not prejudice him 35 *H.* 6. 3.

where no folly was in himself. Rule 63.

9 *El. Dy.* 264. *b.* The husband possessed of a term in the right of his wife, maketh a lease of parcel, rendering a rent, the wife shall have the residue of the term, but not the rent, Rule 9. notwithstanding it come in lieu of the land, Rule 93. and be as it were an accessary unto it, Rule 25.

Things may be done in the night time, notwithstanding, Rule 49. where there is a kind of necessity of doing them then, Rule 44. as arbitrement made and delivered in writing, the last day after the Sun set, is good enough: for judgments and arbitrements require long advice.

11 *H.* 7. 5. So may goods be distrained in the night time for dammage feasant.

Park. 41. If one of the Chapter infeoff Dean and Chapter, by that he himself shall take by his own livery, Rule 18. notwithstanding Rule 20.

13 *H.* 8. 15. A man may do an act to himself, notwithstanding Rule 20. where the law cannot do otherwise, Rule 18. as a feme tenant in soeage may endow her self, an executor pay himself, &c. Counts and declarations must be certain, Rule 66. yet things which contain a necessary implication are good

14 *El. Dy.* 347. enough, Rule 94. as in an *ejectione firmæ*, & count of a lease made by tenant for life, it sufficeth to say, that the lessor is yet seised, without alledging his life expressly. In an information upon the Statute of usury, & count that the defendant took *per viam, & medium*

medium corruptæ mutationis, where it ſhould be *accomodationis*, yet it is good enough.

Corporal ſervice as ſuit of Court, &c. cannot be done by another, Rule 14. notwithſtanding Rule 92. 7 *H.* 4. 9.

Matters of truſt or authority, &c. cannot be granted over; becauſe being ſtrictly taken, they are eſteemed to belong to the perſon, & therefore guided by Rule, 15. Yet an office of ſkill and diligence to one and his heirs, may be granted over. So upon a Letter of Attorney to deliver ſeiſin to A. he may deliver it to the Attorney of *A* for that upon the matter is a poſſeſſion delivered to himſelf, Rule 21. 12 *El.* 379. *b.*

Tenant in tail makes a feoffment with warranty, and leaveth to deſcend a reverſion in fee ſimple expectant upon an eſtate tail, which I.S. hath; this is no aſſets, for it may be tolled by a common recovery (and therefore the law eſteemeth it as if it were ſo.) But it ſeemeth otherwiſe of a reverſion depending upon an eſtate tail of land which the iſſue himſelf hath, for it were the folly of the iſſue in tail to cut it off, Rule 70. 25 *El. Earl of Leic. caſe.*

CHAP.

CHAP. VI.

Of Laws positive.

AND so much of Laws Native.

The Law of nature and of reason, or the Law of reason primary and secundary, with the rules framed and collected thereupon. Which three are as the Sun and the Moon, and the seven Stars, to give light to all the positive laws of the world.

Positive are laws framed by their light, and from thence come the grounds and maxims of all Common Law: for that which we call Common Law, is not a word new and strange, or barbarous, and proper to our selves, and the law that we profess, as some unlearnedly would have it, but the right term for all other Laws. So *Euripides* mentioneth the Common Laws of *Greece*: and *Plato* doth define it, speaking of the reasoning faculty, saith he, which being taken up by the common consent of a Countrey, is called Law; and anon he nameth it the golden & sacred rule of reason, which we

we call Common Law. The place is very notable, it openeth the original and first beginning of the Common Law, it sheweth the antiquity of the name, in effect all one with that which since and by a later name is called *Jus civile* (*quod quisque popul' ipse sibi jus constituit*, as *Justinian* speaketh) it teacheth Common Law to be nothing else but common reason: but what reason? not that which every one doth frame unto himself; but refined reason, *Quæ cum adoleuit atque perfecta est nominatur vere sapientia*, as *Tully* saith, and as *Plato* there hath it, when it cometh to be *opinionor decretum*. How: generally received by the consent of all.

Therefore Laws positive, which are directly contrary to the former, lose their force, and are no Laws at all.

As those which are contrary to the Law of nature. Such was that of the Egyptians, to turn women to merchandize, and common wealth affairs, and men to keep within doors. And of the Thracians, which accounted idleness an honest thing, and stealing very commendable. So if it were made a law, that men might commit adultery, forge false deeds, &c. And this is manifest unto all men. But because the Law of reason is known only to such as are able to judge aright, and that but imperfectly (as

before

before was shewed) therefore here the case is harder, what laws may be said agreeable, and what repugnant thereunto. Only in general (which is sufficient for this place and purpose) it is truly said, and all men must agree, that law in deed repugnant to the law of reason, are aswell void, as those that cross the law of nature.

Positive Laws are sundry and divers, according to the several and divers constitutions of particular places and countries.

Such among the Jews were their Politicals, delivered by *Moses*, which so far as they be positive, bind us not unto them. Such were the antient law of the Grecians, the xii. tables, and civil laws of the Romans, and such are the common Laws of England. And almost so many people so many Laws. And as those Laws are divers one from another, so one and the self same Laws may be altered and changed in themselves, so long as no alteration is permitted against the two main Laws of Nature and Reason.

The

THE SECOND BOOK OF LAW.

CHAP. I.

Of the Common Law of England, whereof the parts of the Realm, and of the persons in it. of Custom and Prerogative.

THE Common Law of England is a Law used time out of mind, or by prescription throughout the Realm. For to plead that there is a Custom among Merchants throughout the Realm, to assign Licences over, is not good, inasmuch as that which is current throughout the Realm, is Common Law, not Custome. And under the name of the Realm of England, it is plain that (a) Scotland and

Litt. 38. *That prescription is a usage time out of mind.*

(a) 8 *R.* 2. *cont.* *claim.* 13.

and Wales (b) much less (c) Ireland, are not included. Neither is the main Sea, that is to say, beneath the low water mark, parcel of the Realm; for there the Admirals jurisdiction (which hath nothing to do of things within the Realm) doth only meddle and not the Common Law. But between the high water mark and the low water mark, where by ordinary and natural course the Sea ebbs and flowes, the Common Law and the Admiralty have *divisum imperium*, one upon the water when it is full Sea; the other upon the land, when it is an ebb.

Statutes 27 **H.**8.**cap.**26. Incorporateth Wales into England.

The whole Realm is divided into several **Counties** or Shires. **And those again into** certain Villages or **Towns: in many of which**, as also in divers manners, whereof it cometh to speak afterwards,

There be special usuages time out of mind altering the common law, which we call Customs.

As in Kent, the Custom of Gavelkind for all the heirs males to inherit alike, and the wife not to lose her dower, nor the heir his Land, though the husband or ancestor be hanged for Felony.

In London, if the Debtor be fugitive, that the Creditor before the day of payment may arrest him to find better surety.

In

(b) 2 *Mar.* 29

(c) 20 *H* 68. *A fine with Proclamations according to* 4 *H.*7. *shall not bar one in* Ireland.

(d) 22 *Ass. pl.* 93. *The Statute* 1 *R.*2.*c.*5. *proveth the Common Law to be so.*

(e) *Sir Hen. Constables. Co.* 107.

(a) 12 *H.*7.18. *Fineux.*

(b) *Lit. consuetudo ex rationabili causa usitata privat. Communem legem.*

(c) *Lit.*46. & 58.

(d) 8 *H.*3. *prescript.* 60. 5 *E.* 4. 30.

Lit. 37.

In many Boroughs the youngeſt Son to inherit all. The wife to have for her dower all her husbands lands; the lands there to be divisible by will.

A County is a part of the Realm, entirely governed by one Sheriff under the King, but all ſubject to the general government of the Realm. And therefore every County is as it were, an entire body of it ſelf, ſo that upon a feoffment of lands in many Towns in one County, livery of ſeiſin made in one parcel, in any one of the Towns in the name of all, ſufficeth for all the lands in all the other Towns within the ſame County. But upon a feoffment of lands in divers Counties, there muſt be livery of ſeiſin in every County.

Alſo an exchange of lands in one and the ſame County is good by paroll; but in divers it muſt be by deed indented. *Lit.* 13.

A man is driven to take notice of many things done in the ſame County, where he is, but not in another. As if an action of debt be brought againſt an Executor, he may pay the aſſets which he hath in his hands to any other to whom the Teſtator ſtood indebted, till notice of the action brought againſt him, if the ſuit be in another County; but not if it be in the ſame County; for there he muſt take notice of the action at his peril. 2 *H.* 4. 11.

An Enqueſt alſo ſhall not take notice of things done in another County; but becauſe

cauſe all are under one general government, therefore things done in ſeveral Shires ſhall be tried by a joynder of Counties, the Jury that trieth the principal may take notice of a thing acceſſary, though it be in another Shire. As in an action of Treſpaſs, if the defendant plead an arbitrement in a Foreign county, and iſſue be taken upon it, and found for the Plaintiff: the Jury there muſt aſſeſs dammages for the Treſpaſs done in the other County.

21 *H.*6.51.

9 *E.* 4.40.

Likewiſe in an action of debt againſt an Executor, who pleadeth, *ne unque adminiſt.* and giveth in evidence a deed of gift made unto him by the Teſtator in his life time in another County, the Jury muſt find it upon pain of attaint. So of a releaſe pleaded to be made in another County in a writ of right.

There be in all thirty nine Shires, Kent, Suſſex, Surrey, &c.

18 *H.*6.13. A Town is a pretinct anciently containing ten families, whereupon in ſome Countries they are called Tythings, within one of which Tythings every man muſt be dwelling, and find ſureties for his good behavior, elſe he that taketh him into his houſe, is to be amerced in the Leet.

Divers of theſe Towns have Hamlets in them, ſome ſpecial places there be in every County out of any Town or Hamlet

The perſons within the Realm are to

to be considered either as one entire or as particular persons.

As one entire body it consisteth of the King and common persons his Subjects.

The King is the head of the Commonwealth, immediate under God. 1 *H.* 7. 10.

And therefore carrying Gods stamp and mark among men, and being, as one may say, a God upon earth, as God is a King in Heaven: hath a shadow of the excellencies that are in God, in a similitudinary sort given him. Gods excellencies and honour stand partly in things incommunicable unto other, partly in such as after a sort he maketh his creatures partakers of both: which the King is said to have, some in truth, others by fiction, all by similitude from the divine perfection.

The first thing in God, and most proper to his sacred Majesty, is the infiniteness of his nature; who, as the philosopher elegantly saith, only is that Circle, *cujus centrum est ubique; peripheria nusquam.* So say our books, that the King in a manner is every where, and present in all his Courts.

In a writ of error upon a false Judgment given for the King, no *Scire facias* shall go forth *ad audiendum errores*, for the King is always present in Court; & that is the cause that the form of entry in all suits for the King is *Henricus Hobart miles, Attornatus domini Regis generalis; qui pro domino* *F. N. B.* 21. *b.*

Rege sequit' ven' hic in Cur. &c. and doth not say, *Dominus Rex per Henricum Hobart Attornatum suum*, &c. And therefore it is also, that the King cannot be *non suit*; that all acts of Parliament, which concern the King or General, and the Court must take notice without pleading of them, for he is in all, and all have their part in him.

25 *H.* 6. *br. nonsuit* 68. 3 *El.* 231.

(*a*) 35 *H.* 6. 26. A second thing proper unto God, is the divine perfection. In the King no imperfect thing can be thought, no (*a*) negligence, or laches, no folly, no infamy, no stain or corruption of blood. So as (*b*) nonage avoideth not his grant, though it be of lands which he hath in his natural capacity.

(*b*) 3 *Eliz.* 213.

(*c*) 1 *H.* 7. 4. By (*c*) his taking of the Imperial Crown upon him, all attainder of his person are purged *ipso facto*.

The excellencies which God bestoweth upon his creatures (for I will touch no more but those that the books of our Law do speak of, and such as are leading rules to the cases that you shall find there argued & debated) are first, Majesty, Sovereignty, Power, Perpetuity; and then that noble complement of Justice and truth.

Brect. lib. 1. *cap.* 8. The Law, saith *Bracton*, gives unto the King *Dominationem & Potestatem*.

2 *H.* 7. *grants* 33. He hath absolute power over all: for by a clause of *non obstante* he may dispense with a Statute Law (and that if he recite the Statute) though the Statute say, such dispensations shall be meerly void.

The King cannot take, he cannot part from

from any thing but by matter of record. *Bract. ibid.* And that is for the Majesty of his person. (*a*) *Stam. pre.* His supream Sovereignty makes him immediate under God. *Omnis quidem sub eo* (*b*) 7 *E.* 4.17. *& ipse sub nullo nisi tantum sub Deo*, saith (*c*) 50 *Ass. pl.* 1. *Bract.* It makes all lands to be holden of him, every surrender unto him to be good, no action to lie against him, for who shall command the King? 731. 18 *Eliz.* 498.

Nay, acts of Parliament do not bind him, unless they concern the Commonwealth, or he be specially named. Neither can the King be Joyntenant with any, though it be of land, or other things that he hath in his body natural: For none can be equal with him. And therefore if two purchase land to them and their heirs, and one be made King, they are now no more Joyntenants, but tenants in Common. Lastly for perpetuity, the King never dieth, but in Law it is said the demise of the King, and a gift unto the King, without saying more, trencheth to his successors. 4 *E.* 4. 21. 1 *El.* 223, & 240. 3 *Eliz.* 239. 4 *El.* 234. 4 *Mar.* 177. *Potentia injuriæ est impotentia naturæ.*

To come to the other two; the power of God is always joyned with justice & truth; for to do wrong, to deal untruly, is not omnipotency, but a thing of weakness and impotency: so it is with the King, he cannot be a (*a*) disseisor, he can be no wrongdoer; for he is all Justice, he shall never be (*b*) estopped. Judgment final in a Writ of right, doth not conclude him, for he is all truth, *Veritas & Justicia*, saith *Bract.* *Circa solium ejus.* They are the two support- (*a*) 4 *E.* 4. 25. (*b*) *F. N. B.* 143. *b.* (*c*) 20 *E.* 3. *Dr.* 15. *F. N. B.* 31. *D*

ters that do uphold his Crown.

Therefore also he hath a prerogative in all things that are not injurious to the Subject. As he may create Corporations, Dean and Chapter, Major and Commonalty, *&c.* make Denisens: and it remaineth good, though he be declared an usurper after (but no continuance in England can make a Denisen, though it be from his childhood, and he sworn to the King in Leets) he may reserve rent unto a stranger, grant a condition or thing in action, give in fee simple, upon condition not to alien, except out of his grant things incident, as Courts and perquisits of Courts upon the grant of a Mannor, sue in what Court he will: as to have a *quare impedit* or Writ of Escheat, returnable in the Kings Bench, or a *quare incumbravit* there, though the record of the Recovery be in the common place. He may alledge in his Court or plea, double matter, or as many matters as he will, and the party must answer to them all, and then the King shall take issue upon any one at his pleasure. He may wave his issue, and demur in Law, and contrariwise, so it be the same term, but not in another term, for so he might do it infinitly. He may challenge a Juror without shewing cause, or the array, because the Sheriff that made it, was cosin to the party. But no challenge shall be of a Juror against him. He is not bound to make a demand (or tender) where a lease is made, reserving a rent with

with a clauſe of re-entry: hath the property of all goods that are *in nullius bonis*, ſhall have the Tythes of Forreſts and places out of any pariſh, take advantage of other mens places, as to have a Writ to the Biſhop, if title appear for him, though he be a ſtranger to the Action. All the Daughters and Heirs (where the anceſtor held in chief) muſt do homage to him: where (if they hold of a common perſon) the eldeſt only muſt do it: where he is to have a benefit, a man may plead more pleas than once, *pur darreine* continuance, as outlary in an action of debt, *&c.* And many prerogatives more he hath, which in their ſeveral places ſhall come more properly to be conſidered.

But in them all it muſt be remembred, That the Kings prerogative ſtretcheth not to the doing of any wrong; for it groweth wholly from the reaſon of the common Law, & is as it were a finger of that hand, although ſo much differing in faſhion (as the head and the body can never be of one proportion) that if you ſet them in parallels together, you ſhall find it to be law almoſt in every caſe of the King, that is law in no caſe of a ſubject. And yet for all that, they are not two but one law. Only the Common Law is as the *primum mobile*, which draws all the Planets in their contrary courſe. 12 *H.*7. 19.

In regard of the King, the Queen his wife is participant of divers

prerogatives above other women.

3 *El.* 231. As in an act of Parliament making all gifts and grants unto her, or by her (whether between the King and her, or between her & any other person) to be of the same effect, as if it were between other subjects, without any benefit thereby to come unto the King, need not be pleaded, but the Court and all the Realm must take knowledge of it, because she is a publick person, in whom all the subjects of the Realm have interest, being the Kings wife, as they have in the King himself. Likewise she may have in her self the possession of personal things during her life, so as she may (*a*) have an action in her own name alone, take lands and other possessions from the King by Charter (*b*) make leases, feoffments, *&c.* which shall be good during her life, but afterward the King shall have them, and divers other prerogatives she hath, which follow in their place.

(*a*) 49 *ass. pl.* 8.

(*b*) 3 *H.* 7. 14.

His Subjects are the members of the Commonwealth, and are Barons and Commons.

Barons we call the Peers of the Realm. For every Duke and Earl is Peer of the Realm, because he hath a Barony belonging unto him. Otherwise Duke and Earl are but names (*a*) of dignity and of honour only, and (*b*) parcel of ones name.

(*a*) 14 *H.* 4. 7.
(*b*) 21 *E.* 484.
8 *H.* 6. 10.

So

So as in every action which he bringeth, or is brought against him, he must be named Earl or Duke, as he is, else the Writ shall abate. But the name of Baron is the name of ones place and calling, which shall not be expressed in any Writ. And where addition is necessary, as by the Statute of 1 H.5. yet he shall never be impleaded by the name of Baron, for it is not any dignity, but must be named Knight if he be one, or Esquire if he be no Knight. And touching Bishops, who enjoy the name of Lords of the Parliament, they have the same in respect of ancient Baronies annexed to their dignity.

32 *H.*6.29.

Stamp. prer. 154.

7 *H.*8.*Cr.*184.

Hunnes case by all the Justices of England.

All the rest are Commons.

The particular persons are natural persons, or bodies politick.

The natural person is every man.

A body politick is a body in fiction of Law that endureth in perpetual succession. And such is the King alone, and by himself considered: and a Parson, the Law calleth him the Rector of a Church, for the King hath two capacities, a body natural (wherein he may inherit from any of his ancestors, or purchase to him and his heirs, and retain the same, notwithstanding he be removed from his estate Royal) and a body politick, wherein he may purchase to him and his heirs Kings of England, or to him

14 *H.*8.3. *Fin.*

4 *El.* 234.

4 *E.*3.17. *Br. Dean, &c.* 2.14.*H.*8.30. and his Succeſſors. So a Parſon is a Corporation by the Common Law, and hath two capacities, one to take to him and his heirs, and the other to him and his Succeſſors. And therein he is ſeiſed in *Jure Eccleſiæ*.

Ibid. And if I.S. be Parſon of D. and land be given to I.S. Parſon, and his ſucceſſors, & to I.S. Clerk, and his heirs; he is a tenant in Common with himſelf.

*F.N.B.*175. **The parſon in regard of his continual attendance upon that ſacred function, is freed from all perſonal charges that may hinder him in his calling.** For ſuch a one ſhall not be choſen Bailiff, Beadle, Reeve, or other ſuch Officer; not be compelled to come to the (*b*) Sheriffs turn, to the (*c*) Leets of the King or other for land annexed to their Churches. And all this by the courſe of the Common Law.

(*b*) *Marl.c.*10. (*c*) *F.N.B.* 160.*c.* (*d*) *Marl.c.*10. *doth ſo recite it.*

F.N.B. 175. *Br. Diſm.*6. **So is every other Clerk within orders.**

To the parſon belongeth of common right (as our books ſay) **the tenth of all manner of yearly encreaſe**, which we call Diſmes or Tythes. And therefore by a Leaſe of *Rectoria*, the Leſſee ſhall have the Diſmes and offerings of the ſame Church; for they are incident unto it.

15 *H.*7.3.

33 *H.*8. *Br. diſm.* 17. And if a Parſon demiſe his glebe to a Lay man, he ſhall pay Tythes, becauſe they are of common right.

Every

Every Parſon before he can be incumbent, **muſt be preſented to the Ordinary, who is to admit him.** And therefore is allowed time to enquire of the Clerks ability. As if he be preſented to the Biſhop when he is ready to ride, who willeth him to come to him within three days to be examined: if he come not then, nor within ſix months after, the Biſhop may collate by lapſe; for there be many things to diſable him from having the Benefice. As if he be criminous, inſufficient, a Villain, have not his Letters of Order, &c. And if a meer Layman be preſented, admitted, and inſtituted, and no ſentence of deprivation or nullity given, the Ordinary cannot collate by lapſe: for till that time, the Church is full to all intents. When the Ordinary admitteth him to be able, that is called an admiſſion, when he admitteth him to the charge, as to ſay to the Clerk *Inſtituo te habere curam animarum*, that is, inſtitution. 14 *H.* 7. 21. 12 *and* 13 *El. Dy.* 291.

And then the Archdeacon is to put him in poſſeſſion, by delivering the ring of the Church door unto him, and ringing of bells, which is called an induction; and that being done, the party becometh an Incumbent. Before which induction there is no poſſeſſion or freehold in him, of glebe, or houſe, or diſmes. So as a rent granted by a Prebendary, after admiſſion and inſtitution, and before induction, with confirmation 20 *El.* 528.

of

of the Ordinary before induction, and of Dean and Chapter, the day of induction is void.

Lit. 143. 6 *E.6. Dy.*69. The Incumbent hath not the meer right in him of Land in the right of his Church. But the Fee-simple is in abeyance, that is to say, only in the remembrance, intendment and consideration of law; Therefore he cannot discontinue, and every Act which he doth with such land may be avoided, when he ceaseth to be incumbent, except such as are done by consent of Patron and Ordinary, which bind for ever.

Lit. 143. 12 *H.*8.7.

3 *E.*4.3. If the Church be void six months, without presenting, which is called a lapse, the Ordinary himself may collate, that is, a Clark appoint of his own, and if it be void six months after his time, then the Metropolitan, and six months after his time, the King may present All this to be understood, if the Patron present not before them. But so long as the Church is void, though it be two years after, the Patron may present, and the Ordinary or Metropolitan are bound to admit him. *Quære* whether it be so where the King is intituled to present by lapse.

Doct. & Stud. per Br. plen. 15.

Doct. & St. ibid.

When one Church is not able to find

find the Cure, the ordinary by consent of the Patrons may unite it, or make a consolidation of it to some other. And it seemeth that in this case, the consent of the King is not requisite, because here is no prejudice wrought to any, for if one man be Patron of both Churches, he shall have the sole presentment: if there be several Patrons, then they shall present by turn, and the King shall have the lapse, as before he should. Otherwise it is upon an appropriation, for that is an amortisement, and therefore all must joyn in the making of it. 40 E. 3.28. Fine. 50 E. 3.27. Belnap.

Statutes.

37 H. 8. Cap. 19. By assent of Ordinary, Incumbent, and Patron, under their Seals, an union may be made of two Churches, being not above six pound yearly value in the Kings Books, nor distant one from another above a mile; saving to the King his Tenths and First Fruits

In corporate Towns, it must be by assent of the Corporation.

If such a poor Parish shall within a year assure by writing to the Incumbent and his Successors, eight pound yearly, the union shall be void.

Over and besides those Corporations that were at the Common Law there be divers others which have grown of later time, by a special

cial foundation and election, whereof some
14 H.8. Fen. are aggregate of many persons, that is to say, of a head and body; other consist in one singular person.

14 H.8. Ibid. These Corporations are all of them Temporal or Spiritual.

The Temporal made by the King, as Mayor and Commonalty and many more, which he maketh or may make every day. Also (a) Colledges; as Masters and Fellows, &c. divers Towns are so incorporate before time of memory, with power to hold plea, by writ of *ex gravi querela*, or such like, and are called Boroughs from whence came the Burgesses to the Parliament; and this maketh the difference between a Borough and a Town. So that (b) up-land Towns, which are not ruled and governed as a Borough is, are but Towns, though they be inclosed in Walls, as Ludlow and such like. And every (c) Borough is a Town, but not *è converso*. (d) The names of all the Towns in England, and which are so incorporate, and which not, are of Record in the Exchequer.

(a) 9 El. fy. 255.
(a) Lit. 36. 40 Ass. pl. 27. & 41.
Lit. 36.
(b) 40 Ass. pl. 41.
(c) Lit. 38.
(d) 40 Ass. pl. 27.

4 H.4. cap. 2. 4 H. 4 cap. 12. Coo. The spiritual ones were for the most part made by the Pope, but had their power to purchase from the King. And these likewise are of two sorts, for either they are Regular or Secular.

Regular, which have entred into Religion (and thereupon called Religious)

ligious) profelling to vow three things, Obedience, Voluntary Poverty, and perpetual Chastity. Wherefore these are dead persons in the accompt of Law. Only their head hath power to purchase or do such other things to the use of the house. And of this sort are Abbot and Covent, Prior and Covent, &c. *Littlet. 66.*

Secular are such as have entered into Religion, as the Bishop and his Chapter, Master of Hospital and his Brethren, or confreres, guardian of a chappel, and the chaplains, &c. Also Archdeacons, and such like. Touching the Bishop and his chapter (which make but one body) their possessions are divided: so as the Bishop hath part by himself, and the Chapter the residue. Which Chapter consisteth of a Dean, as the chief, and Prebendaries or such like, who are most properly termed the chapter: and of these also, their possessions for the most part are divided, The Dean having some part sole in the right of his deanry: and the particular Prebendaries some other part in the right of their Prebends: the residue the Dean and Chapter have together. And every of them is to such purpose incorporate by himselfe. 40 *E.* 3. 23. *Co.* 75. 17 *E.* 3. 40. *Pa.* 21 *E.* 4. 17 *Ass. pl.* 29. 18 *E.* 3. 36. *F. N. B.* 195.

And these spiritual Corporations are sometimes presentative, sometimes 26 *Ass.*

times dative, perpetual or removeable, sometimes elective, and have a Common Seal, according as their Corporations. To them also Parsonages may be appropriate by the Patron, Ordinary and King, and Vicars endowed to serve the cure. Whereupon a *præcipe quod reddat*, lieth against the Vicar only, without naming of the person, for he alone is Tenant of the Free-hold, and may have a *juris utrum* (or other action) against the person. All which is to be understood of an antient indowment, but not for lands whereof he is endowed by the Ordinary.

Statutes.

Magna Charta cap. 36. A Gift of Lands to a Religious house, to take it back to hold of them, is meerly void, and the Land forfeit to the Lord.

Stat. de Religiosis, cap. 1. Land given in mortmain, under colour of a term, forfeit to the Lord, the immediate Lord hath one year to enter, the next Lord half a year, and so from Lord to Lord, till it come to the King.

Westm. 2. cap. 41. The King (founder of a Religious house) may seize lands which he gave them, if they alien.

See all the Statutes of the dissolution of Monasteries, Chaunteries, &c.

CHAP

CHAP. II.

Of Poſſeſſions.

Of the common Law there be two parts.

One that concerneth Poſſeſſions.

The other the puniſhment of offenders.

Prerogative.

The King ſhall have to his own uſe, and therefore may lett to farm rendring a rent, all the poſſeſſions of a fool (a) natural, not of any other Ideot (b) during his Ideocy, but (c) not that which he hath title unto by entry or action. And therefore upon an office (finding that the Ideots anceſtors died ſeiſed of an eſtate tail) it is ſufficient to traverſe the dying ſeiſed, for that only intituleth the King.

31 *E.* 3. *Sau. def.* 37.

(a) 18 *E.* 3. *Sci.*

(b) *re fac.* 10.

(c) *Stam. prær.* 34.

1 *H.* 7. 24.

Statutes.

Prerogative cap. 9. The King ſhall have the cuſtody of their lands during their life.

Prerogative

Prerogative chap. 1e. And of Lunaticks, during their Lunacie to their own use.

28 *H.*8. *Dy.* 12. *Fitz.*

When one hath the possession of any thing to anothers use, this use at the Common Law, was accounted nothing, but as a matter in conscience and Chancery only. Whereupon these Statutes following were made.

1 **R.**3. cap. *Cestui qui use* may grant the land, or suffer a recovery of it.

7 **H.**7. cap. 1. 17. The heir of *Cestui qui use* (of land holden by Knights service) shall be in ward, and pay relief.

19 **H.**7. cap. 15. Execution upon judgment, statute or recognizance, shall be good against *Cestui qui use*.

The heir of *Cestui qui use* of land in soccage, shall pay relief, heriot, &c.

27 **H.** 8. cap. 10. Where any be seised to the use or trust of another, *Cestui qui use*, or trust, shall have the possession in such quality, manner, and condition, as he had the use or trust. So when any be seised to the use or intent that another shall have a yearly rent out of the same lands, *Cestui qui use* of a rent shall be deemed in the possession thereof, of like estate as he had that use.

27 **H.**8.

27 H. 8. c. 16. Bargains and ſales to raiſe an uſe of inheritance or freehold, muſt be by deed indented and inrolled within ſix months, in a Court of record at Weſtminſter, or in the County where the land lieth.

Sundry men poſſeſſing the ſame thing by purchaſe, are joyntenants or Tenants in common.

Joyntenants which poſſeſs by the ſame title. As if two, three, or more, be infeoffed of certain lands, to hold to them and their heirs, or during their own or anothers life, or diſſeiſe another to their own uſe, or a leaſe be made, or a horſe, or other chattel perſonal given unto them. *Lit. ca. of Join.*

And here the ſurvivor ſhall have the whole in the ſame ſort as he had his part, excepting only preſent intereſts of the thing it ſelf granted by him that dieth. *Lit. Ibid.*

As a leaſe for years, though the Leſſee never had poſſeſſion, or though it be to begin at a day to come, and the Joyntenant which made it die before the day, bindeth the Survivor: for the Leſſee hath a preſent intereſt.

Otherwiſe it is of a grant to have a leaſe, if the grantee pay x l. before Midſummer next; and the Joyntenant which made the grant, dy before the day: for there is no inte- *5 El. Ploy. 203. Brown.*

rest at all, but a communication only, till the money be paid. Otherwise it is also of a rent charge granted out of the Land, whereof they are Joyntenants: for that is no interest in the land it self.

Lit. ibid.

Lit. chap. of tenants in common.

Tenants in common are they which posses by several titles.

As if two Joyntenants be, and one alieneth his part to another, the Alienee, and the other Joyntenant, are Tenants in common: for the alienee cometh in by one of the Joyntenants feoffment. So if three Joyntenants be, and one alien that which to him appertains in fee; the alienee is of this third part tenant in common, with the other two Joyntenants: but they remain still Joyntenants of the other two parts. So if land be given to two men, or two women, and the heirs of their two bodies ingendred: the Donees have a joynt estate during their lives: but their issues are Tenants in common of the inheritance. For every one claimeth as heir of the body of his father. And it is impossible that two men or two women should have one heir of their bodies between them begotten.

So if the land be given to a Mayor and Commonalty, and their Successors, and to I. S. for I. S. taketh in his own right, and the other in the right of the Corporation. And therefore upon a feoffment to a corporation, & another person, there must be several liveries, in respect of their several capacities

7 H. 7. 9.

pacities which maketh them tenants in common.

So if lands be given to two, the one moity to the one, and the other moity to the other. In like ſort if a leaſe for years be made to two, or two buy a horſe or ox, and one grants that which to him appertains of the term, horſe or ox to another. *Habendum* — *Lit. Ibid.*

To poſſeſſions this is general, that they may be granted.

Statutes.

3 H. 7. c. 4 All deeds of gifts of goods & chattels made of truſt to ones own uſe, ſhall be void.

13 El. c. 5. made perpetual.

27 El. c. 1. Every gift, grant, bargain, and conveyance of lands and chattels, or of leaſe, rent, common, or other profits out of them, & every bond, ſuit, judgment and execution ſince the beginning of her Majeſties reign, or hereafter to be had or made, for the defrauding of any perſons juſt action, ſuit, debt, account, dammage, penalty, forfeiture, herriot, mortuary or relief, ſhall be void againſt that perſon, his heirs, executors, &c.

The parties or privies knowing ſuch a fraudulent gift which ſhall juſtifie it to be done *bona fide*, or ſhall alien ſuch things ſo to them conveyed; forfeit one years value of the lands and profits out of it, and the whole value of the goods & chattels, & the ſum of ſuch covenous bonds, & ſhall have

half a years prisonment: this act extendeth not to common recoveries, nor vouchees in a formedon, nor to any gift, *&c. bona fide*, and upon good consideration to any person, not knowing of any fraud.

27 El. c. 4. Every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use of Lands, tenements, or hereditaments, made since the beginning of her Majesties reign, or hereafter to be made, for the defrauding of purchasors of the land it self, or any part or profit out of it, shall be void against the person so purchasing for mony, or other good consideration, and against all claiming under him; with penalty, as in the former statute,

This extendeth not to the avoiding of any grant, *&c.* upon good consideration & *bona fide*. If any such conveyance, *&c.* be made with a clause of revocation or alteration at his pleasure, by writing; and after he shall bargain, demise, sell, grant, convey, or charge the same lands, *&c.* for mony or other good consideration (the conveyance not revoked or altered) then the conveyance, *&c.* shall be void against the bargainees, *&c.* and all claiming under them, (lawful morgages only excepted.)

Prerogative.

Every grant made by the King, upon

upon ſurmiſe or ſuit of the party, ſhall be taken moſt beneficially for the King, and againſt the party. So as a pardon to the Sheriff, *ex ſpeciali gratia & mero motu* of all miſpriſions, offences, contempts and deceits, ſhall diſcharge him of an amerciament, for returning of one *quarto exactus*, where indeed he was outlawed. But if himſelf ſee for ſuch a pardon, he muſt have expreſs words, otherwiſe it will not help him. 37 *H.* 6. 21.

His grant ſhall not be taken to two intents, that is, ſhall not inure to any other intent than that which is preciſely expreſſed within the grant.

As if he grant an office for life to an alien, it is nothing worth: for it cannot inure alſo to make him a Deniſen. 9 *E.* 4. *Den.* 1.

If he grant land to *A.* in fee, which *A.* is his villain; this ſhall not manumiſe him: for the villenage is a foreign matter not expreſſed in the grant. 19 *El. Ploy.* 502.

But the King may create a Duke, and in that patent grant him land by the ſame name, or make a Mayor or commonalty, & by the ſame patent give them Land, or grant them licenſe to purchaſe: for theſe are two ſeveral things expreſſed in the Grant. *Br. patents* 44.

No grant of his is good, when it appeareth within the body of the grant, that the King is deceived. 18 *H.* 8. *Epa.* 104.

As if he give lands to one and his heirs

males. For this is a fee simple, and it is plain the King meant to grant but an estate tail.

Statutes.

1 H. 4. c. 6. The Kings grants shall be void, if express mention be not made of the value, in the petition of those that sue for it.

F.N.B. 202. 26 H. 8. 2. (a) F.N.B. 202. c. 7 H. 4. 5. 12. (b) 9 H. 7: 24. (c) 39 H. 6. 50.

A grant by an infant under the age of 21 years (a) one out of his right mind, whom we call *non sanæ memoriæ*, or *non compos mentis*, or compelled thereunto either by (b) duress of imprisonment, or fear of some bodily hurt threatned to himself, not to his Father, Mother, Brother, &c. as loss of life & member: or though it be but of imprisonment: for imprisonment is a corporal pain, and one may be imprisoned that he may die of it. Otherwise it is of a menace to break or burn down ones house; for that is but the loss of ones goods, is avoidable, that is to say may be avoided at any time by entry, action, &c. if they deliver it with their hand: as in a feoffment, and themselves make livery, or a gift of goods, and themselves deliver them.

But if they deliver it not with their hand, as in a grant of a rent, advowson, &c. or a feoffment by letter of Attorney, &c. it is meerly void, and nothing at all passeth.

paſſeth. So as they may have a treſpaſs or aſſize, and remain tenant to the Lord, and therefore ſhall be in ward, notwithſtanding any ſuch feoffment.

So of a grant made by one that hath no underſtanding. As if he be born dumb, deaf and blind. But one dumb may make a good grant, or born dumb and deaf. For divers may have underſtanding by their ſight only, though dumb and blind. *Park.* 5.

Grants of an infant in reſpect of having things neceſſary cannot be avoided.

As a bargain for his neceſſary meat, drink, and apparel: for he cannot live without them. 18 *E.* 4. 2.

Other grants of his where himſelf hath likewiſe benefit. We call it, *quid pro quo*, are only voidable, as if he lett land for years, reſerving a rent. 18 *E.* 4. *ibid.*

To this place belongeth exchange which is a mutual grant of equal intereſts, each in exchange of other. *Lit.* 15.

As of land in fee ſimple, for other of the ſame eſtate. But to exchange an eſtate *pur auter vie*, for an eſtate for life is not good. For though both have a freehold, yet an eſtate during anothers life, is not ſo high a freehold, as an eſtate during his own life, & in every exchange there be two grants, *Park.* 55. *Lit.* 13.

for each granteth to other his land in exchange. And the very word it self of exchange is necessary: For if I give to a man an acre of land by deed indented, and he by the same deed give unto me another acre for the same acre, nothing passeth without livery, if the word Exchange be not in.

9 E.4.21.

Lit. 40. 19 *H.6.* 34. *Lit. Ibid.* 3 *E.3. Br. in. cid.* 39. *Lit. Ibid.* (a) 12 *H.7.* 18.

Prescription is as available as any grant. As that one and his ancestors time out of mind, have been seised of a certain yearly rent out of land, and distrained for it being behind. Or if a villain and his ancestors, as of villains in gross, of that one, and those whose estate he hath in the Mannor of D. have had a Park there time out of mind. For of such things as cannot be granted without deed or fine, the prescription must be in him and his ancestors whose heir he is: and not in himself. and those whose estate he hath: because he cannot have their estate without writing, which must be shewed to the Court. As of a villain in gross, a (a) hundred rent, &c. Otherwise it is of things appendant or regardant to a Mannor.

A Possession is either upon a limitation or condition, or else absolute.

11 *H.7.* 17.

Upon a limitation which ceaseth upon the doing or not doing of something. As a lease for years, upon condition if

if the Leſſee go not to *Rome* by ſuch a day, his Eſtate ſhall ceaſe. And therefore in this caſe the grantee of the reverſion may enter if he go not; for thereby his eſtate is determined and void. So if Lands be given to husband and wife during the coverture; or a Parſon make a leaſe to one ſo long as he is parſon; this in both caſes is an eſtate for life upon limitation. *Lit.* 90.

Upon condition, which is only defeaſible upon the doing or not doing of ſomething. As a leaſe for years or life, upon condition if the Leſſee go not to *Rome* by ſuch a day, the Leſſor and his heirs may reenter. And therefore here the grantee of the reverſion cannot reenter for the condition broken. So if a man by deed indented, infeoff another in Fee-ſimple, or make a gift in tail, or a leaſe for life or years, reſerving to him and his heirs a yearly rent, payable at a certain time, upon condition, if the rent be behind, &c. it ſhall be lawful for him and his heirs into the ſame lands or tenements to reenter, &c. In theſe caſes if the rent be not paid at or before the time limited in the condition; the feoffor or his heirs may enter in ſuch lands or tenements, and them have and hold in his firſt eſtate, and thereof quit and clean to ouſt the feoffee, donee, or leſſee &c. And this is termed a condition in deed. So of ſuch eſtates as have by the law a condition annexed unto them; although it be not ſpecified in the writing. As a man granteth *Lit.* 74. & 89.

granteth to another by his Deed, the office of a Parkership of his Park, to have and occupy the same office for term of his life; the estate which he hath in the office, is upon condition in Law; that is to say, that he do well and lawfully keep the Park, and do that which to the office appertains, otherwise the grantor and his heirs may lawfully ouſt him, and grant it to another. And such a condition which is understood by the law to be annexed to any thing, is as strong as if the condition were put in writing.

In the same manner it is of the grant of a stewardship, Bedleship, Bailywick, or other offices.

Absolute, which is neither upon limitation nor condition.

Again, Possessions are in being, which properly we term **in Possession or in action.**

In possession, which one doth injoy.

In action, which one ought to injoy, either in respect of a right or title.

15 *El. Ploy.* 555 *Manwood.* **Right** is when a wrong was done before: as by wrongful entry upon his lands, or taking away his goods, &c.

Title, when no wrong was done.

As in a feoffment upon condition, and the feoffee breaketh the condition.

Of

Of things in action: as cauſe and matter of ſuit, entry to contrive ones right, or upon title; as for a condition broken, and ſuch like, **no ſtranger ſhall take advantage.** And ſtrangers are accounted, beſides the parties themſelves, which are not either privy in blood, as the heir to the feoffor: or in ſucceſſion, as the Succeſſor of Major and Commonalty, &c. or executor, adminiſtrator, &c. which repreſent the Teſtator. *Preamble of 32 H. 8. cap. 8. ſo reciteth the Common Law.* *Park. 164.*

Statutes.

32 H. 8. cap. 34. All grantees of reverſions may enter upon Farmers, for any forfeiture (or condition) and have like advantage againſt them (by action only) for any other covenants, condition or agreement (contained) in the Indenture of their leaſe) as the Leſſors, their Heirs, or Succeſſors might. And the like for the Leſſees againſt the Grantees of the reverſions (recovery in value only excepted.)

Therefore things in action cannot be granted but to him that hath poſſeſſion: and that by releaſe or confirmation: for a releaſe or confirmation of land to him that hath nothing in the land, is void. *1 H. 6. 4.*

Releaſe is a paſſing of the grantors intereſt. The form whereof is, *De me & hæred. quietum clamavi, &c.* *Lit. 105.*

Confirma-

Lit. 119. **Confirmation is a ratifying of the grantees poſſeſſion.** The form whereof is, *Confirmavi C de D. ſtatum & poſſeſſionem, &c.*

Furthermore, the grant of every thing in action, and of ſuch things in poſſeſſion as cannot paſs by livery of the hand, muſt 6 *H.* 7. 9. **of neceſſity be by deed.** For the right of the thing real or perſonal, cannot be given *Park* 13. nor releaſed by parol. No more can a reverſion, rent, common inigroſs, or villain in groſs, be granted by parol. But a horſe, ox or ſuch perſonal thing, corn and trees growing upon the ground may: and alſo the wardſhip of body or land.

So a leaſe for life, with a remainder over, is good without deed; for the remainder paſſeth by livery and ſeiſin.

Park 25. **A deed is a writing ſealed and delivered.** For if either a parchment without Writing be delivered as ones deed, yet it is *Park* 27. not his deed, though an Obligation be afterwards written in it: or if it be a writing but not ſealed at the time of the 9 *H.* 6. 37. delivery of it as his Deed, it is a ſcroul and not his deed. Or if I make and ſeal a deed, and the party take it without my delivery; I may plead it is not my deed. **And belongeth always to him whoſe** 34 *H.* 6. 1. **poſſeſſion is made by it.** As if I releaſe to two diſſeiſors, and deliver the 6 *H.* 7. 3. deed to one, the other ſurviving ſhall have

have it. Or if the Diſſeiſee releaſe to the Diſſeiſor, and he make a feoffment of the land, the feoffee ſhall have the releaſe. But if a feoffment to two without deed, & the writings of the land are delivered to the one, the other ſhall not have them: or if having two joynt feoffees, I releaſe to both, and deliver the Deed to one, the other though he ſurvive, ſhall not have it.

But a writing read in another form to one not lettered, that is, that cannot read, is not his deed at all, though he ſeal and deliver it. 1 *H.* 7.

A deed is a deed poll or indenture. — *Lit.*

Poll, that which is the only deed of the grantor. —

Indenture, that which is the mutual deed of both: yet the deed of the grantor is the principal, and the other is but a counterpane. And therefore if the Leſſor ſeal, and not the leſſee, it is as good againſt him as if both had ſealed. And if there happen any variance between the deeds, it ſhall be taken as the deed of the grantor is, and the other ſhall be intended only the miſpriſion of the writer. *Lit.* 88. 14 *El.*

And barreth them from ſaying contrary to any thing in the Indenture. As upon a leaſe by Indenture or fine, both parties are eſtopped to ſay that the Leſſor had nothing in the land: ſo as if the Leſſor come afterward to have the Land by purchaſe or deſcent, the 15 *El. pl.* 434

the Leſſee may enter upon him by way of concluſion, and likewiſe the Leſſee ſhall by eſtoppel be driven to pay the rent.

Lit. 149. **Sometime bare acts,** without indenture or other matter, **work an eſtoppel in like ſort.** As if the husband diſcontinue the wives land, and take back to him and his wife for their lives; the wife is remitted, but the husband (by this bare taking back) is eſtopped to ſay ſo.

CHAP.

CHAP. III.

Of Hereditaments, where: of Eſtates.

A Poſſeſſion is an Hereditament or Chattel.

Hereditament is a Poſſeſſion which one may have an eſtate in.

One born of Parents out of the Kings allegiance; ſuch an one we call an alien. But (*a*) an aliens ſon, born in England, is no alien: Nor by the common law, one born beyond Sea, of Engliſh Parents, in the Kings ſubjection. And the Statute 25 *E.* 3. only maketh it more clear; **is diſabled to enjoy any hereditaments,** he ſhall have no (*b*) real nor mixt action, nor is inheritable; but either his younger brother being a denizen, ſhall have it, or the (*c*) Lord by Eſcheat.

(*a*) 36 *H.*8. *Br. deniſon* 9. 1 *R.*3.2. *Huſſey.*

(*b*) 38 *H.*8. *Br. deniſon* 10 & 16.

(*c*) *So Doct. & Stud. thinketh Br. deniſon.* 7.

Prerogative.

Therefore ſuch an one purchaſing (d) any though it be but for years, it is **the Kings.**

(*d*) 14 *H.*4. 20. *c. Mar. Br. deniſon* 25.

An eſtate is particular, or an inheritance.

And is uncertain or certain.

Uncertain,

Uncertain, which is determinable at anothers pleasure, as an estate of sufferance, and at will.

7 E. 4. 6. At sufferance, when after lawful occupation, he continueth possession without authority.

As lessee for years, holding in after his term expired, and before any entry made upon him. But if he continue after entry upon him, then is he a wrongdoer.

Lit. 24. 14 H. 8. 12. At will, when an estate is made during pleasure.

Statutes.

6 H. 8. c. 15. If the King give land, or an office, *durante beneplacito*, and after grant the same unto another: the second grant shall be void, if mention be not made therein of the first.

— Certain, which is not so determinable, and is called a term, whereupon may depend a remainder or reversion. for a remainder cannot be but upon a particular estate precedent: As upon a lease for years or life: upon an (*a*) estate to one and his heirs during the life of I. S. for in effect it is but an estate for life. But not upon an estate to one and his heirs so long as I. S. hath heirs of his body

7 E. 6. Ploy. 83. (a) 11 H. 4. 42. 4 E. 6. Ploy. 29. Cf. 18: a post 268

body; For that is a fee-simple determinable. Nor (*b*) at the Common Law, upon an estate to one and the heirs of his body: for it was a fee-simple conditionally; (*c*) neither could any reversion be of it. (*b*) 3 *E. Pl.* 235, & 247. (*c*) *ibid.*

Remainder is a residue of the estate, at the same time appointed over: and therefore cannot be said to be *ex assignatione*, but *ex dimissione*, of the Lessor, because it passeth at the same time. 38 *H.* 6. 30.

Reversion is a residue of the estate not at the same time appointed over. As if a man let land for life, without saying more, the reversion of the fee simple is in the lessor. And if he afterwards grant this to another, the grantee hath a reversion. *Lit.*

Terms are forfeited by pluching the inheritance out of him that hath it. As if tenant for life (or years) of land make a feoffment in fee: for thereby the fee-simple passeth, by reason of the livery. *Lit.* 137. *a fund. Leg. per Br. Forf.* 96.

Otherwise it is, if tenant for life of a reversion or rent, grant it by his deed in fee: or if tenant (*b*) for life take a fine of a stranger, *sur conusance de droit*, or *sur release*; for such a fine encreaseth not his estate. But a (*c*) fine by tenant for life to a stranger, *sur conusance de droit come ceo quil ad de son done*, is a forfeiture. So if tenant for life (*d*) pray in aid of a stranger, or in (*e*) a writ of right brought a- (*b*) 1 *H.* 7. 22. (*c*) 42 *H.* 3. 20. (*d*) 9 *H.* 7. 20. (*e*) 9 *H.* 5. 14.

gainſt him) joyn the miſe upon the more right. And theſe are by reaſon of the eſtoppel.

Terms may be ſurrendred, that is to ſay, yielded up and drowned (For a ſurrender cannot be of a fee-ſimple) to him that hath the next & higher eſtate As two Joyntenants, and to the heirs of one be that hath the freehold cannot ſurrender to the other: for both have a joynt poſſeſſion, and the ſame eſtate. But tenants in common may; As the Alienee of him that hath the freehold in the former caſe may ſurrender to the other tenant for life, where there is a remainder for life with remainder over in fee, cannot ſurrender to him in the remainder in fee; for he hath not the next immediate eſtate. Leſſee for life cannot ſurrender to him in the remainder for years: But to him in the remainder for life he may, for that remainder (as unto him in the remainder) is an higher freehold than the others eſtate, which is unto him but *pur auter vie*.

12 *H.* 4. 21.

22 *H.* 6. 5.

Park. 113.

Park. ibid.

Park. ibid.

Statutes.

Gloceſt. c. 7. Tenant in dower alienating longer than during his own life, he in the reverſion ſhall recover againſt the alienee in her life time.

A term is for years or life. The preſent eſtate for life is termed a freehold (in deed) if he be actually ſeiſed of it (in Law) before his entry, when it is caſt upon him

him by course of Law, as upon the heir by death of his ancestor; upon him in the remainder by death of the particular tenant.

A term for life is either for his own or *pur auter vie*, that is, for anothers life, where the tenant *pur auter vie*, dying before the other, whom we term *Cesti qui vie*, he that can first hap it, shall enjoy out the term, & is named an occupant, but if land be let to one and his heirs during anothers life, the heir shall put out the occupant. *Lit.* 167.

Inheritance followeth. Every Inheritance at the Common Law is called a fee simple: The release whereof, or of an estate for life, is not good to one that is but tenant for years, without privity. As if tenant for life or in fee releaſe to the Leſſee for years of his diſſeiſor. But the releaſe of a term for years to the leſſee for years of him that doth eject him, is good enough: for there needs no privity. 9 *H.* 6. 44.

And to these two estates of Inheritance and life, warranty doth belong: which is an assurance warranting such an estate: for the word *warrantizabimus* only maketh a warranty, and not *defendemus*. And if a Leaſe for years be made with warranty; this ſounds not in nature of warranty, but of a covenant, becauſe it is a chattel. And if the Leſſee be ouſted, yet he may have an action of Covenant. But in a warranty of a fee or free- *Lit.* 166. 26 *H.* 8. 3.

3 *E. for.* 44. hold, the party shall have no advantage unless he be tenant of the land.

Every exchange hath a warranty knit by law. And therefore the exchanger or his heir may vouch to warranty by an exchange without deed, and his assignee rebutt.

Lit. 1. **Inheritance of an estate descendable:** for inheritance never lineally ascends as from the son (that purchaseth in fee-simple, and dieth without issue) to the father: but always descends, as to Unkle, brother, &c. **to his heirs that hath actual possession.**

Lit. 2. As if the eldest brother once enter, his sister of whole blood shall inherit, and not his Brother of the half blood. But if he never enter, the brother of the half blood, shall inherit as heir to his father.

Lit. 2. **An heir is the next of worthiest of whole blood,** or the half blood is inheritable, **being also of blood to the first purchasor.**

Lit. 2 & 3. So the blood of the fathers side is worthier than the mothers: the elder brother worthier than the rest. Therefore these shall inherit first.

49 *E.* 3. 12. So lands purchased may go to the heirs of the part both of the father and mother of the purchasor, unless it be once attached in the heir of the part of the father; for then the heir of the part of the mother shall never

never have it, becauſe they are not of blood to him that was laſt ſeiſed.

But Lands deſcended go only to the heir of that part from whence it deſcends: as if from the father who did purchaſe it; then it may go to the heirs of the part of the mother of the ſame father, but not to the heirs of the part of the ſons mother. For though they be of blood to the ſon that was laſt ſeiſed: yet they are not of blood to the father which was the firſt purchaſor.

He that is begotten out of marriage, is called a baſtard: for if a woman great with child take a husband, the iſſue born (though it be within ſix weeks after) is no Baſtard. Or if the wife elope from her husband, and continue in adultery, yet the iſſue born during that time (if both be within the four Seas) is intended lawfully begotten. And if one die, his wife privement enſeint (that is, ſo with child as it is not diſcerned) and ſhe take another husband, the iſſue born within a month (or ſuch a time as it is impoſſible he ſhould beget it) ſhall be accounted the ſon of her firſt husband, & ſuch a baſtard is of blood to none: in Law, (*a*) *nullius filius.* 1 *H.*6.3. 1 *H.*6. *ibid.* 7 *H* 4.9. 21 *E.* 3.29. (*a*) *Lit.* 41.

And therefore cannot inherit: nor bring (*b*) a Writ of Detinue as heir, nor be a villain (*c*) but by his own confeſſion in Court of Record: and the land ſhall (*d*) eſcheat where there is no iſſue but ſuch a baſtard, not other heir. (*b*) 35 *H.*6.9. (*c*) *Lit.*41. (*d*) *E.*2 *baſt.* 20.

(e) *Lit.* 94. But (e) marriage following after, gaineth him the right of inheritance, if after the fathers death he enter before his younger brother (f) or ſiſter, if both be females, born (g) of the ſame father and mother within eſpouſals, who is called *mulier puiſne*, and the other *Baſtard eigne*: and continue (h) the poſſeſſion all his life without interruption. And that (i) although the *mulier puiſne* be an infant: becauſe this bindeth the right; For (k) ſuch a baſtard is a *Mulier* by the Law of Holy Church: and therefore hath a colour to enter as heir to his father.

(f) 17 *E.* 3. 59. *baſt.* 32.

(g) 23 *El. per Dy. in Sir Th. Gerrar. c.*

(h) 2 *E.* 3. 16.

(i) 36 *Aſſ. pl.* 2. *Br. deſcent.* 29.

(k) *Lit.* 94.

Lit 53. If the next be women in equal diſtance, as Daughters, Siſters, Aunts, &c. they ſhall inherit alike, and are but as one heir, called parceners or coparceners.

Lit. 160. Where the general entry of one is of the reſt, if they liſt. So is not a ſpecial entry to her own uſe.

As if Tenant in tail have iſſue two daughters, and the eldeſt entreth into the whole, and thereof maketh a feoffment with warranty, this is a collateral Warranty, and a barr to the *puiſne* daughter for her moity. Which proveth, that this ſpecial entry is not the entry of both: for then it were a Warranty commencing the diſſeiſin, and no barr. But all this is to be under-

understood where the other coparceners list to have an entry for them, and not otherwise. And therefore in a *Partitione faciendâ* of rent, it is a good plea for the defendant, if she is sole seised, without that that she holds *pro indiviso*. And the plaintiff is driven to a *nuper obiit*. And if one enter, both cannot be vouched as heirs, for that is to their disadvantage. But both may have an assise. 4 *H.*7.9. 43 *E.*3.19.

The inheritance it self that descendeth, shall be charged by the deed of the same (a) ancestor. (a) 10 *E.*4.10.

Whether Obligation, covenant, annuity, warranty, or whatsoever else: but not by any bare matter (b) *en fait*, as of ones Ancestor time out of mind have been wont to pay an annuity, *&c.* (b) 10 *E.*4.10.

Binding himself and his heirs.

But if either a man bind his heirs to pay xx l. a year, or such like, but not himself, or himself (d) without naming his heirs: there the heir shall not be charged, though he have assets by descent. And therefore (e) the heir being charged only by reason of assets, when he hath assets, the same is counted his own debt, and the action of debt lieth against him in the *debet & detinet*, not in the *detinet* only. And for one acre only by descent the heir shall be chargeable to an Obligation of 1000 l. but no other land shall be put in execution, but it. So, though it be but a reversion that descendeth: in (c) 31 *E.*1. *gr.* 85. (d) 15 *El. Pl.* 457. *Br. Annuity.* 13.2 *H.*4.413. (e) 15 *El. Pl.* 441. 17 *El. Dy.* 344. 40 *E.* 3.15.

which case the Judgement shall be *Quod recuperet debitum, & damna de prædicta reversione levanda cum acciderit.* And a special Writ shall go out to extend to the whole.

Statutes.

Merto c. 5. A *Nomine pœnæ* shall not incur upon an heir within age.

The dying seised of the inheritance and freehold together. Not of a freehold only, as of an estate for his own or anothers life, nor of a remainder or reversion where the Free-hold is out of him. *Lit. ca. of desc.*

Whereby the land descends unto his heir. For if it escheat, as by the death of the alienee of the Disseisor, without heir, the disseisee may enter; *Lit. ibid.* **taketh away the entry of every one:** We call it a descent that tolleth entry, whether it be of one that hath right, as in the dying seised of a disseisor (*a*) abator, (*b*) or intrudor, or of one that hath but title that **may have an action:** as an Infant (*c*) whose feoffee after his full age, dieth seised: he (*d*) in the reversion, where tenant for life doth alien, and the alienee dieth seised, the Devisee (*e*) of Land in *London*, if the heir enter, and die seised. For the Infant may have a *Dum fuit infra ætatem*, he in the reversion a *consimili casu*, and the devisee in that case an *ex gravi querela*. But if the disseisor of the feoffee upon condition, or an alienee in Mortmaine die seised

(*a*) *Lit. ibid.*
(*b*) 4 *E.6. pl.* 47.
(*c*) *Lit.* 96.
(*d*) 21 *H.6.* 17.
(*e*) 9 *H.6.* 25. 21 *H.6.* 17. 33 *Ass. pl.* 11. 47 *E.3.* 11. 1 *E.6. Br.* 30.

ſeiſed: or if a man deviſe, that I.S. ſhall ſell his lands at London, &c. and the heir be diſſeiſed or make a feoffment, and the Diſſeiſor or Feoffee die ſeiſed: yet the feoffor upon condition in the firſt caſe, the Lord of whom the Land is holden in the ſecond caſe, and I. S. in the laſt caſe may enter, notwithſtanding any deſcent: for they have no remedy.

But claim upon the Land within a year before the death, it is called continual claim, **or if they dare not upon the land for fear of ſome bodily hurt, then as near the Land as they dare, ſaveth their entry.** *Lit. ch. of cont. claim.*

Statutes.

32 H. 8. cap. 23. The dying ſeiſed of a diſſeiſor by ſtrength, and without title, tolleth not the entry of him and his heirs, which at the time of the deſcent had good title of entry, unleſs the diſſeiſor had peaceable poſſeſſion by five years next after the diſſeiſin.

A fee-ſimple is a fee-ſimple, conditional or abſolute.

Conditional is a fee-ſimple to one and the heirs of his body: for that is a fee-ſimple at the Common Law: but the having of iſſue made it a more perfect fee-ſimple than before. *40 El. Pl. 250.*

Which

30 *E.*1. *Form.* 85. **Which before iſſue cannot be alienated after iſſue had, becometh an abſolute Fee-ſimple.**

(a) 7 *E.*3.36. 8. *per* 4 *El.* 11 *Pl.*240. 30 *E.* 1. *ibid.* And may be alienated or forfeited by attainder of felony: **But ſo, as if the Iſſue fail before the alienation, the donor,** or giver **ſhall have it.**

And this by the Statute of **Weſtm.** 2. c.1. being reſtrained from all alienation (to the prejudice of the Iſſues) and that ſo as by the very words of the Statute, a reverſion depends upon it, is now become, and made by the conſtruction of that Statute, a new kind of eſtate, divided from a fee-ſimple, and called an eſtate Tail. Which name for plainneſs ſake we uſe hereafter, calling the other only a fee-ſimple. And the name of Inheritance we apply indifferently to them both. In which ſenſe all common uſe doth take thoſe words.

Statutes.

Weſtm. 2. c.1. The Will of the giver (according to the form in the Deed of Gift manifeſtly expreſſed) ſhall be from henceforth obſerved. So that they to whom the land was given under ſuch condition ſhall have no power to alien the land ſo given, but that it ſhall remain to their iſſue after their death, or ſhall revert

yert to the giver or his heirs (if iſſue fail) neither ſhall the ſecond husband of any ſuch woman from henceforth have any thing of the land ſo given, upon condition after the death of his wife (by the Law of England) nor the iſſue of the husband and wife ſhall ſucceed in the Inheritance: but immediately after the death of the husband and wife (to whom the land was given) it ſhall return to their iſſue, or to the giver or his heirs, as aforeſaid.

34, and 35 H. 8. cap. 20. No common recovery of lands in tail, of the gift or other proviſion of the King or his Progenitors (though it be with voucher againſt tenant in tail, the remainder or reverſion being in the King at the time of the recovery) ſhall bind the heir in tail, or barr him of his entry. Tenant in tail ſhall take no advantage for any recompence in value againſt the vouchee or his heirs.

Hither belong Hereditaments given in frank marriage; that is to ſay, freely in marriage with ones Kinſwoman.

For the very word Frank-marriage implieth an inheritance to the Donees, and the heirs of their two bodies begotten. *Lit. 4. 2. 60.*

But land cannot be given in Frank marriage with a man that is Coſen to the Donor, but always with a Woman. *H. 8. B. Fra. 12.*

Abſolute

Absolute is a Fee-simple to one and his heirs whatsoever, which descending to females (if one of them have lands of the same Ancestor by Frank-marriage she shall have no more unless she be content to put those Lands in Hotchpot; that is, that the value thereof be allowed to the other.

Lit. 59. As if x. acres were given to her in Frank-marriage, and xx. acres more (all of equal value) descend from the same Donor, she putting all together that that value may be known, shall retain her own x. and have v. acres more.

Lit. 61. But if the lands descend from the father of the Donor, or other Ancestor, and not the Donor himself; she shall have her part in that which descendeth, without putting in Hotchpot; for she is not advanced by him, but by the other.

Lit. 61. No more shall any Hotchpot be, but in lands given in Frank-marriage. For if a woman have lands by any other gift, she shall have her part of that which descendeth, as if no such gift had been. And the reason of all this is, for that (if she will not put the Land in Hotchpot) the Law intendeth that she holds her self sufficiently advanced. And note, that upon the

Lit. 59. Hotchpot, the lands given in frank-marriage must always remain to the Donee.

To this place are to be referred Lands

Lands given to a Corporation, which go in perpetual ſucceſſion.

And therefore Lands given to a Mayor a Commonalty, without ſaying, and to their Succeſſors, is a Fee-ſimple, and though the Grant be for their lives. For thoſe are void words. 27 *H.* 8, 15.

And a colour in Action of Treſpaſs, cannot be given in a corporation by a leaſe for term of their lives; for being a Body Politick (which never dieth) they cannot have ſuch an eſtate. 21 *E.* 4 66.

Here two ſpecial eſtates for life, dower, and Tenancy by the curteſie of England, do ariſe after ones death that hath an inheritance joyned with the Free-hold.

For they (*a*) may be of a reverſion depending upon an eſtate for years, and conſequently of the rent, if any be reſerved. (*a*) 9 *El. C. B.*

But (*b*) not where one hath an eſtate for life, the remainder to another in tail, the remainder to his own right heir: **whether it be a Fee-ſimple, or ſuch an eſtate tail as may go to the iſſue had between the Doners, that wife or that husband (if the Doner be a woman)** As if the lands be given to a man & the heirs that he ſhall beget of the body of his wife; the ſame wife ſhall be endowed, but not a ſecond wife. And of lands given to a woman, and the heirs of her body begotten by the husband, her husband may be tenant by curteſie, but not (*b*) 40 *E.* 3. 15. *Litich. of dow.* 4 *El. Pl.* 239.

a

a second. So of lands given before the Statute of *West.*2. to a man and a woman, and the heirs of their two bodies; the second wife shall not be endowed, nor the
Li.chap.of dow second husband be tenant by courtesie, for their issue cannot inherit: But in both cases the wife of every issue (inheriting by force of that gift) shall be endowed, and the husband of every such issue may be tenant by courtesie. So of lands given to a man and the heirs of his body, or to a woman and the heirs of her body, whatsoever wife the husband taketh may be endowed, and whatsoever husband the wife taketh may be tenant by courtesie.

*Lit.*7. **Dower is an estate whereby the woman hath the thirds in severality, who**
9 *E.*4.47. **must be nine years of age at the time of her husbands death. Detaining of Deeds concerning inheritance descended to the**
(*b*) 2 *H.*7.6. **heir, is a barr of her dower, so long as she** detaineth them: but (*b*) so it is not of lands purchased by the heir.

Li.chap.of dow **If the husband at the Church doo;**
(*c*) *So he must* which is called an endowment *ad ostium*
be Lit.8. *Ecclesiæ*, or, being (*c*) heir apparent
(*d*) *F.N.B.* by the fathers or mothers consent,
150. which is called an endowment *ex*
(*e*) 8*E.*2.*dow.* *assensu patris* or (*d*) *matris*, &c. for
154. the (*e*) Son must make the endowment,
(*f*) *Park* 86. and they assent, do (*f*) presently upon
(*g*) 44*E.*3.43. affiance, not (*g*) before espousals, en-

dows

dow her of any certainty, as of the whole moiety, or less part, &c. this shall barr her of the thirds if she agree to it. But so shall not an endowment, *ad ostium cameræ*, nor *ex assensu fratris*, or *consanguinei*: Therefore it is at her election after her husbands death to hold her to this endowment, or to take her Dower at the Common Law. And in such endowments the wife may enter after her husbands death; without any bodies assignment (because the certainty of the land which she shall have appeareth) which in dower at the Common Law she cannot. F. N. B. 150. 21 H. 6. 25. Littlet. 8.

Statutes.

Magna Chart. cap. 7. The wife, after the death of her husband, shall abide in his chief messuage forty days, within which time her dower shall be assigned her. If the chief messuage be a Castle, then she shall have a competent house provided her till her dower be assigned.

West. 2. cap. 34. A woman that leaveth her husband, and abideth with an Adulterer, shall not have dower, unless the husband (voluntarily, and without coercion of the Church) reconcile himself, and suffer her to inhabit with him.

11 H. 7. cap. 20. If a woman that hath an estate in dower for life, or in tail joyntly with her husband, or only to her self,

ſelf, or to her uſe in any lands, &c. of the inheritance or purchaſe of her husband, or given to the husband and wife by the husbands anceſtors, or any ſeiſed to the uſe of the husband or his Anceſtors, do ſole (or with an after taken husband) diſcontinue or ſuffer a recovery by covin, it ſhall be void. And he to whom the land ought to belong after the death of the ſaid woman may enter (as the woman had been dead) without any diſcontinuance or recovery: provided that ſhe may enter after the husbands death. But if the woman were ſole, the recovery or diſcontinuance barreth her for ever.

This act extends not to any recovery or diſcontinuance, with the heir next inheritable to the woman, or by his conſent of Record inrolled.

27 H. 8. c. 20. Where an eſtate is made in poſſeſſion or uſe to husband and wife, and his heirs, or the heirs of their two bodies, or to them for their lives, or for the wives life for her joynture, ſhe ſhall not have any dower: upon a lawful eviction of that joynture, ſhe ſhall be endowed according to the rate of land of her husbands whereof ſhe was dowable.

Such a Joynture being made after marriage, the wife (after her husbands death) may refuſe it, and betake her to her dower, unleſs the Joynture be made by Act of Parliament.

Tenancy by the curteſie of England

land is an eſtate, whereby of an actual poſſeſſion, the husband that had iſſue by her born alive (whether the iſſue be male or female, heard or ſeen, and whether it afterwards die or live, or if (a) the iſſue be born alive, it is ſufficient, though it be not heard to cry (in as much as he may be born dumb) ſhall have the whole. *Lit.* 7. (a) 28 *H.* 8. *Dy.* 25. *Fitz.*

But no tenancy by curteſie ſhall be of a poſſeſſion in law. As where lands deſcend to the wife, and ſhe dieth before the entry, by her, or by her husband, or any of them. Nor of a thing in ſuſpence: As where tenant in fee of the Land marrieth a woman that is ſeiſed of the ſeigniory in fee, the husband can never be tenant by the curteſie of the Seigniory: for by the intermarriage it is ſuſpended. And it is called tenancy by the curteſie of England, becauſe no other Realm uſeth it. *Park* 90 & 89. *Lit.* 7.

CHAP. IV.

Of Land.

HEreditaments, are Tenements, or bare Hereditaments.

A Tenement is a possession holden, the fee-simple whereof, when he that hath it dieth without heir, cometh to the Lord. *Littlet.* 2.

Which is called an escheat. As if Land descend from the father, and he die without an heir of the part of the father. Or a Bastard purchase land, and die without issue. 39 *Ass. pl.* 7.

Of this sort are lands and advowsons.

Land is a tenement or annual occupation.

For if the tenant of twenty acres of land before *quia emptores terrarum*, make a feoffment of one of the acres, to hold of him by vj d. and dieth without heir; the Lord shall have a Writ of Escheat, supposing that he held of him xix. acres, and vj d. rent, yet indeed he held not the rent but the land. And in his Count he shall declare all the special matter. So in a Writ of 21 *H.* 7. 39.

Ward

Ward of the heir of the Meſne; the Writ ſhall ſuppoſe the rent to be holden, and declare ſpecially. Or he may have a general Writ of the land, or a ſpecial Writ, becauſe the Meſne held the land *unde redditus ille provenit*. All which proveth, that indeed not the ſeigniory, but the land is holden. Therefore of land, rent, &c. the pleading is, he was ſeiſed of his demeſne as of fee. But an advowſon lieth not in manual occupation, therefore the pleading there is, He was ſeiſed in fee, without ſaying in demeſne. F.N.B. 139.c. Lit. 1.

Under the name of land are comprehended not only gardens, meadows, paſtures, woods, rivers, &c. but alſo meſſuages, tofts, mills, caſtles, and ſuch like.

For in a *Præcipe quod reddat* of a meſſuage, the warrant of Attorny, is *quod talis po. lo. ſuo (1) poſuit loco ſuo I.S. in placito terræ.*

Churches and Church-yards belong to the Incumbent. 11 H. 4. 12.

For things annexed to the Church or Glebe, as trees or graſs growing there, are the Parſons, or he ſhall have an action for them, and for entry into the Church-Yard or Glebe. And if he be ejected out of his Church, and another take the profits, he may have an aſſiſe of the Rectory, Church-yard and Glebe: for it is his Freehold. 38 H. 6. 20.

Doct. Stud. 16.

Preſcription here is of no force. For it maketh no right in land, but in rent or profit out of land.

Prerogative.

50 Aſſ. pl. 1.
18 El. Pl. 498.

All land is holden of the King immediately, or by means: himſelf having not any higher upon earth of whom to hold.

8 E. 3. Eſch. 12.
8 El. Fl. 314.

Eſcheats of all Cities appertain unto the King. All mines of gold and ſilver, or wherein the gold and ſilver is of the greater value, are the Kings.

14 H. 3. ſtat. Hib. doth ſo recite it.

Among coparceners the eldeſt upon partition ſhall have the chief houſe.

Lit. 137.

Seiſin delivered of land, we call it livery of ſeiſin; and the making of the eſtate we call feoffment, **always paſſeth a Free-hold,** though he be but tenant for years, at will, or ſufferance, that maketh it. **And otherwiſe a freehold of land cannot paſs ſave by releaſe,** (a) **and confirmation** (b) **where they were by way of enlarging an eſtate.** As a leaſe for years, & afterwards releaſe or confirm to the Leſſee, to have and to hold to him for life, or to him and the heirs of his body, or to him and to his heirs &c. for a feoffment with livery made by one to his Tenant (c) at will, or (d) for years,

4 E. 6. fl. 25.
Lit. 12.
(a) Lit. 109.
(b) Lit. 121.
(c) 22 H. 6. 43.
(d) 22 E. 4. 38.

years, is void, except it be by deed, and then it ſhall inure by way of confirmation.

Exchanges (*e*) **endowments** (*f*) **and ſurrenders** (*g*).

(*e*) *Lit.* 13.
(*f*) *Br. dow.* 7.
(*g*) 44 *Aſſ. pl.* 3.

Livery within the view, ſo we call an **eſtate made within view of the land**, be it by delivery of a deed of feoffment within the view, or otherwiſe, **is a good livery of ſeiſin, if the other enter in the feoffors life time**: elſe the land deſcendeth to the heir of the feoffor, and the feoffment ſhall never effect.

38 *E.* 3. 11.
2 *H.* 8. *Br. feoff.* 70.

CHAP. V.

Of Advowſons.

A Dvowſon is the intereſt of preſenting to a Church.

15 *H.* 7. 8.

And this alſo lieth in tenure. For a common perſon may give it to hold of him. And the Writ of Right of Advowſon is, *Quod clamat tenere de te.*

CHAP. VI.

Of Seigniories.

HItherto of **Tenements.**

Ware Hereditaments are those which are not holden, and concern the land or persons.

Those that concern the land, are extinguished or gone for ever, when he that hath them, hath also the possession of the land that they concern, in as high and continuing an estate as he hath the hereditaments.

Otherwise they are but suspended or gone for the time.

34 *Ass. pl.* 15. As if the Lord purchase the tenancy in fee, and though it be to him and another, and that other survive. For his estate is as high in the tenancy as it was in the seigniory.

But if one that hath a rent-charge in fee, grant it for life to the tenant in fee of the land, or in fee to the tenant for life of the land, that is by a suspension of the rent. And therefore (*a*) in the first case it may be with a remainder over, & (*b*) in the second the

(*a*) *Abridgm. of Assises.* (*b*) *Park.*

the tenant may grant it in his life, and his heir shall have it after his death. For the estate was not so high in the one as in the other.

So if a man that hath a rent-charge, in fee going out of land, entermarry with a woman Tenant in fee of the land: or if the Tenant infeoff his Lord upon condition. For there in the first case the husband may grant this rent, notwithstanding the entermarriage: and in the second case, if the tenant enter for the condition broken, the seigniory is revived. For the estates are alike perdurable. 5 *E.* 3. 16. *Park.* 19.

These are leviable by distress, or such as cannot be distrained for.

Distress is taking of chattels. As (*a*) a Cartfull of Corn, a fold (*b*) of sheep, &c. a (*c*) mill-stone, &c. if it be not part of the Mill, though it be fixed to a piece of timber with nails, windows, and doors, when they are remov'd off from the hooks. But a Mil-stone, though it be lifted up to be picked and beaten: yet so long as it lieth upon the other stone, remaineth parcel of the mill, and cannot be distrained. No more can windows and doors hanging upon the hooks, though they be removeable, **found upon the same land**, but in other land not holden of him, he cannot distrain for his seigniory, except it be by the Tenants grant, **for satisfaction of arrerages** for dismes lett reserving a rent, cannot be distrained for the rent, nor when (*a*) 2 *H.* 4. 15. (*b*) 20 *E.* 4 3. (*c*) 14 *H.* 8. 25. 9 *H* 6. 9. 13 *E.* 4. 6.

11 *H.*4.40. 3 *Mar. Pl.*154. they are severed from the ninth part, in as much as there is no distress but upon land in demesne, neither could a distress be taken upon a Pistary, but that it containeth land and demesnes.

Prerogative.

9 *H.*6.9. 13 *E.* 4 6. **The King may distrain in another land** of the same mans for his seigniory or rent-charge, but so shall not the grantee. 9 *H.*6.9. is, That a common person cannot distrain for his seigniory, but in the land holden of him, except it be by his Tenents grant. But the King may in any place.

13 *E.* 4 6. is, That the King for his services or for a rent-charge, may distrain in all his Tenants lands. But so shall not the Kings Grantee.

Statutes.

Marlb. c. 15. Distresses shall not be taken in the High way or Common street; but by the King or his Officers having special authority.

Artic. Cler c.9. Nor in the ancient fees of Churches.

The distress being put in pound overt, or open pound; that is, some place where the owner may lawfully come at them, as if they be 9 *E.*4.2. things that have life, to give them meat,

meat, &c. he that diſtraineth ſhall not be charged, what hurt ſoever they receive, for quick Chattel muſt be put in pound overt, that the owner may give them ſuſtenance: dead, need not. But if they be marred in his default that diſtraineth, he ſhall anſwer for them.

Statutes.

Marlb. c. 4. None ſhall lead diſtreſs out of the County where they were taken. The neighbour that doth it to his neighbour, ſhall be fined. The Lord that doth it to his Tenant ſhall be amerced.

1 & 2 Ph. and Mar. c 12. No diſtreſs of Cattel ſhall be driven out of that hundred, rape, wapentake, or lath, where it was taken: except to a pound overt within the Shire, not above three miles from the place where it was taken. No diſtreſs taken at one time ſhall be impounded at ſeveral places, whereby the owners ſhall be conſtrained to ſue ſeveral repleviesthe pain of both theſe v l. and treble damages. No perſon ſhall have above iiij d. for the poundage for any whole diſtreſs impounded: and where leſs hath been uſed, there to take leſs, upon pain of v t and loſs of the money he hath taken above iiij d. any preſcription notwithſtanding.

Ware hereditaments that may be diſtrained for, are a Seigniory, and Rentcharge.

Seigni-

Seigniories are services whereby lands are holden.

Services are common to all certain Estates, or proper to Inheritances.

Common, as fealty, and rent-service, whereof fealty is incident to every such estate. For Lessee for life or years, shall do fealty of common right.

Lit. 29.

But tenant at will shall not, because he hath no sure estate. And therefore the seigniory or tenancy being altered (whether by descent or grant) it must be done anew.

Lit. 23.

All other (both common and proper) grow by reservation.

Fealty is an oath to be faithful to his Lord for the tenements.

Lit. 19.

Rent-service is a rent to be paid to the Lord at certain set times.

And to this place we may referr all services that lie in feasance. As to be ones Butler, to cover his house to scour his ditches, &c. But a reservation of things in prender or user, as to have common for four Beeves, or four Cart-loads of wood, maketh no tenure.

Park. 127.

Of which kind, two among the rest are specially to be considered; that is to say, frank almoigne and divine-service.

Frank almoigne is, when a man of the Church holdeth freely in alms:

alms: For if an Abbot, tenant in frank-almoign, alien to a ſecular man, he ſhall do fealty to the Lord, becauſe a ſecular man cannot hold in frank-almoign. And the Tenant in this caſe holdeth of the donor, and is within his fee. For the Kings grantee of ſtrays *infra feoda ſua* ſhall have them in lands holden of him in frank-almoign. And the tenant ſhall have againſt him a Writ of Meſne, or *Ne injuſte vexes*. And if the abbot tenant in frank-almoign, and all the monks die, the Lord ſhall have the eſcheat; for the which he is bound to ſay prayers, and theſe prayers are the ſervices. But becauſe theſe prayers are not limited in certain, he neither ſhall do fealty, nor is ſubject to diſtreſs or *Ceſſavit*, if they be not done. *Lit.* 31. 7 *E.* 4. 10.

The Lord muſt warrant ſuch a tenant againſt himſelf and his heirs, and ſave him harmleſs of all manner of ſervices, againſt the Lords above, which we call acquittal. 7 *E.* 2. *gur.* 73. *Lit.* 32. *for aqu.*

Divine ſervice is a ſpiritual kind of ſervice limited in certain: As to diſtribute in alms to an hundred poor men, an hundred pence, &c. *Lit.* 30.

Theſe are the ſervices whereby every certain eſtate may be holden.

There follow thoſe proper to Inheritances.

The grantee whereof ſhall hold of the grantor by ſuch ſervices as he holdeth

Park. 134. holdeth over, if other ſervices be not reſerved. As if there be Lord, and tenant by Knights ſervice, and the tenant before the Statute of *quia emptores terrarum* infeoff a ſtranger of the tenancy, without any thing reſerving: Now the feoffee and his heirs ſhall hold of the feoffor and his heirs by Knights ſervice.

Or the grantor may appoint him to hold of the next Lord. As if before the Statute of *quia emptores terrarum*, there were Lord meſne and tenant, and the tenant infeoff a ſtranger to hold of the meſne; this is good, and the feoffee ſhall hold of the Meſne by the ſame ſervice that his feoffor held, and the feoffor cannot reſerve new ſervices, for to them the meſne is a ſtranger; But if the feoffment were to hold of the Lord paramount, that were void. So if the feoffment were to hold of any other ſtranger.

Statutes.

18 E. 1. *Quia emptores terrarum.* In all feoffments to one and heirs, the feoffee ſhall hold his land of the chief Lord of the fees by the ſame ſervices that the feoffor held before. If the feoffment be made of parcel, he ſhall hold of the chief Lord *pro particulâ*, according to the quantity of the Land, and the feoffor ſet free for the part.

A meſne, that is, he that holdeth over, if it be by no greater ſervices than the tenant

nant holdeth of him, we call it ovelty of ſervices, whether they be the ſame as each of other by xx*s.* or leſs as he by xx*s.* and the tenant of him by xxx *s.* **muſt acquit the tenant of all manner of ſervices againſt the lords paramount.**

But Donees in frank-marriage cannot hold but by fealty. And therefore a gift in frank-marriage, rendring a rent, the reſervation is void, for it is contrary to the nature of a frank-marriage, which is, to render nothing till the fourth degree be paſt. Some think the reſervation good, and the frank-marriage thereby deſtroyed. But all agree, that the frank-marriage, and the reſervation cannot ſtand together. **And that of the donor till the fourth degree be paſt.** And therefore a gift in frank-marriage, the remainder in tail to a ſtranger, is a good frank-marriage, for the reverſion of the fee is in the donor, which maketh a tenure between them: otherwiſe it is, if the remainder were in fee, **who muſt alſo acquit them of all manner of ſervices.** And therefore the Donees in frank-marriage may have a Writ of Meſne.

4 *H.*6. 22. *Old ten. Fol.*7. 17 *E.* 9. *Lit.* 4. 12 *H.* 4. 9.

Prerogative.

One that holdeth of the King, as of his perſon, which is a tenure in chief. But if a Prince of *Wales*, before Statute of *Quia emptores terrarum*, make a feoffment to hold of his perſon, and after

30 *H.*8. *Dy.*44.

ter is made King, this is no tenure in chief, for a tenure in chief is the higheſt & moſt honourable ſervice in Law, becauſe it is to the chief head of the body of the Realm, and therefore muſt be immediate unto the King, and take his original creation from the King himſelf, not from a ſubject. So to hold of the King, as of his honour of *Glocester*, is no tenure in chief; for it is not of the Kings perſon, alienating the free-hold without licenſe, forfeiteth the Land.

(a) 14 E. 3. Q. impedit. 54.

Statutes.

Mag. Ch. c. 31. By a common Eſcheat of a Barony, &c. to the King, the tenant ſhall not hold in chief.

1 E. 6. c. 4. No more when a Seigniory cometh to the King by treaſon or diſſolution.

1 E. 3. c. 12. The King from henceforth ſhall not hold as forfeit ſuch lands if they be alienated, but ſhall have a fine for them in the Chancery.

Services proper to eſtates of inheritances, are homage and ſuit of Court.

Lit. 1c. For tenant for life ſhall not do nor take homage, but only tenant in fee-ſimple, or in tail, in his own or anothers right. As the husband for land that he ſo holdeth in the right of his wife, if he have an iſſue by her, ſhall do homage in her life time: but not after her death, if he holds himſelf

himſelf in as tenant by courteſie. Neither can a man at this day make a mannor notwithſtanding that he give land to many ſeverally in tail, to hold of him by ſervices and ſuit of Court, for he may make a tenure but not a Court, for a Court cannot be but by continuance time out of mind. 23 *H.* 8. *B. comprise* 31.

Homage is an Oath of fidelity, acknowledging himſelf to be the Lords man: wherein the tenant muſt be ungirt, uncovered, kneel upon both knees, and hold both his hands together between the Lords hands ſitting before him. This is to be done only to the Lord himſelf. But the Lords Steward or Bayliff may take fealty for him, **and but once during the tenants life.** So as having done it once, he neither ſhall do it again to the heir of the Lord, or grantee of the ſervices, nor to the ſame Lord, if other lands do afterwards deſcend to the tenant that are holden by homage of him. And though it be in the Kings caſe. *Lit.* 18. *Lit.* 9. *Lit. Ibid.* (*a*) *Lit.* 33. *b.* 24 *H.* 8. *Br. Br. fealty* 8.

Prerogative.

The Kings Chamberlain ſhall take homage for him. *F. N. B.* 256. *c.*

Statutes.

33 **H.** 8. *c.* 22. A fee ſet down for reſpiting of homage in the Exchequer or other Courts. 14 *H* 3. *St. Hib. ſo reciteth it.*

When an inheritance deſcend-

eth

eth to coparceners, the eldest only shall do homage.

Prerogative.

But if they hold of the King, all of them must do it.

When one and his ancestors, whose heir he is, have held by homage of a Lord and his ancestors, whose heir the Lord is, time out of mind, and the Lord hath received homage, for the alienee of tenant by homage ancestrel, holdeth not by homage ancestrel, nor shall have warranty from the lord, because the continuance of the Tenancy in the tenant is discontinued. No more shall the tenant himself by homage ancestrel, if he alien in fee, and afterwards take it back again. And if the Lord by homage ancestrel grant his seigniory, the tenant need not attorn, unless the grantee will warrant the land to the tenant and his heirs, for otherwise his warranty were lost, because by attornment the homage ancestrel is destroyed, that bindeth him to warrant and acquit the tenant. And the tenant may have a Writ of Mesne. But if the Lord have not received homage, he is not bound. Therefore such an one may compel the Lord to receive his homage by a Writ *de homagio capiendo*.

Lit. 33.

18 *H.* 6. 2.

45 *E.* 3. 23.

11 *H.* 4. 52.

Lit. 33.

45 *E.* 3. 23.

Suit of Court is a service by coming to the Lords Court. For suit of Court one shall be distrained and not amerced, which proveth it to be suit-service.

Old ten. Fol. ult.

But

But for a ſuit real (which is to come to the Leet) he ſhall be amerced and not diſtrained: yet a tenure to come to a Leet or hundred, and to do there ſome ſpecial ſervice, as to be a Cryer, &c. is a good ſervice, but not ſuit-ſervice. And every ſuit-ſervice is intended to a Court-Baron. 12 *H.*7.17. 21 *E.*4.15.

Land in the Lords hands (whereof ſeveral men hold by ſuit of Court) is termed a Mannor: the land conſidered apart from the ſervice, is termed demeſns.

Statutes.

Marl. c. 9. None ſhall be diſtrained to do ſuit of Court, unleſs he be ſpecially bound to it by his Charter of feoffment: except ſuch as they or their anceſtors were wont to do it, forty years before the making of this Statute, whether they were infeoffed by deed or without.

The eldeſt Coparcener ſhall only do ſuit of Court, and the other parceners contribute. And where there be many feoffees, the Lord ſhall have but one ſuit, and the feoffees contribute.

The particular kinds of ſervices (whereby lands of inheritance are diſtinguiſhed) be ſocage and Knights ſervice: both draw unto them certain commodities to the Lord partly in the tenants life, and partly after his death.

That in his life is a reaſonable aid

or portion towards the making of the Lords eldest Son a Knight, and towards the marrying of his eldest daughter. It is called *ayd pur faire fits Chivalier*, and *pur file marrier*. And if the Lord confirm to his tenant to hold by fealty and certain rent, releasing all other services and demands; yet he shall have reasonable aid, for it is incident to the services, and not released by those words.

40 E. 3. 22.

Statutes.

Westm. 1. c. 35. Reasonable aid shall be xx shillings for a whole Knights fee, and as much for xx l. land in Socage: and so after the rate of more, more, and of less, less. The time of levying it to make his son Knight must be, when he is fifteen years old; to marry his daughter, when she is seven. If the father after the aid levied die before he marry his daughter; the fathers Executors shall be charged to the daughter of so much as the father received; or his heir, if his goods be not sufficient.

25 E. 3. c. 11: Reasonable aid to make the Kings eldest son a Knight, or to marry his eldest daughter, shall be levied of all Land holden of the King, without mean, according to the rate in the former statute.

The other after his death are Wardship and relief.

Fitz. gard. 67. Wardship is the custody of the bo-

dy

dy and land of the heir within age, which ſhall be till xiiij of a woman.

Relief is a portion to be paid by the heir to the Lord.

Socage is a tenure to be done out of war: As if one hold by fealty only, or by fealty and certain rent, or by homage and fealty, or by homage, fealty, and rent for all manner of ſervices, or by eſcuage certain, that is to ſay, by paying a certain ſum of money, as half a Mark, &c. and no more or leſs (howſoever the Parliament aſſeſs it) towards finding of a man for the war, when the King makes a voyage royal towards the Scots, &c. or by paying a certain rent for Caſtle-ward, &c. *Li. chap. of Soca.*

Where the next of kin to whom the inheritance cannot deſcend, As if land deſcended of the part of the father, then the mother, or the next coſin of the mothers ſide, if of the part of the mother, then the father, or next friend of the fathers ſide ſhall have the Heirs wardſhip till xiiij. to the Heirs own uſe. And therefore muſt render an account to the heir at his full age, of the iſſues and profits of his lands, and of the value of his marriage, if he marry him within 14 years of age. And if he dy before the heirs age of fourteen, yet his executor ſhall not have the wardſhip; no more ſhall the husband after the death of his wife, Guardian in ſocage. But if the wife be Guardian in ſocage, and the husband (or they both by indenture)

tute) lett the land; yet the wife after her husbands death may enter: for in as much as she hath it only in the right, and to the use and benefit of the Infant, the ordering and directing of this land shall not be taken from her by any act of her husband.

Statutes.

Marl. c. 17. Guardian in Socage may not do waste, exile nor destruction, nor give nor sell the marriage but to the commodity of the heir.

Littlet. ibid. **Here for relief the Lord shall have presently so much as one years rent amounts unto.** As if the tenant hold of the Lord by Fealty, and x s. rent payable at certain terms of the year (at half yearly or quarterly) then the tenant shall pay unto the Lord x s. for relief over and above the x s. that he shall pay for the rent, and that by and by, without tarrying till the day of payment of his rent, and of what age soever that the heir be.

Prerogative.

33 *H* 8. *Br. Livery and ouster lemain* 60. *Stam. prer. c.* 35. *H.* 6. 52. *F. N. B.* 252. **Tenure by Socage in chief giveth the King primer seisin, or the value of that land by a year, if the heir be of the age of xiiij. at his ancestors death:** therefore there the heir shall be driven to sue his livery, but not if he be under xiiij, at the death of his ancestor. And if being under xiiij. he sue his livery, it shall be *una cum*

eum exhibemus: but not if he ſue it at xiv. If one hold of the Kings perſon to do ſomething concerning war, but not to be performed by the perſon of a man, as to give him yearly a bow, ſword, dagger, &c. it is called petty Serjeanty, and is but a tenure in Socage.

Knights ſervice is a ſervice touching war to be done by the body of a man. As if one hold by Eſcuage uncertain, that is to ſay, by being himſelf or ſome other for him with the King 40 days, well and conveniently arrayed for the war (if he hold by a whole Knights fee, or 20 days if he hold by the moity of a Knights fee, and ſo by proportion) whenſoever the King maketh a voyage royal into Scotland &c. elſe to pay ſo much money as ſhall be aſſeſſed by Parliament. Or if a man hold of any Lord to keep his Caſtle in time of war (which is called Caſtle-guard) or to blow a Horn in time of invaſion by enemies, which is called Cornage. *Lit. Chap. of Knights-ſervice* F.N.B. 83.c.

To all Knights-ſervice homage is incident, but not unto Socage. **Here the Lordſhip is the (a) Lords (b) to his own uſe** Therefore his executors ſhall have the ward during the heirs non-age (c) **and that till xxi. of an heir male.** And therefore if the Lord marry a male that is his ward, before 21. yet he ſhall be in ward for the land till that age. 7 E. 4. 28. (a) *Lit.* 22. (b) *Lit.* 72. (c) *Br. gar.* 111.

Statutes.

Mag. Ch. c. 3. The Lord ſhall take homage

mage of the heir before he have wardſhip.

Part.c.6. If one enfeoff his heirs within age to cauſe the Lord to loſe his wardſhip, and die, yet the Lord ſhall have the wardſhip.

So when a fraudulent feoffment is made by a tenant, upon condition to revert, after certain years, to him or his heirs, if the feoffees pay not a certain ſumm, to the value or more than the value of the Land. In this caſe the Lord ſhall have a Writ *de exſtodia reddenda*, and if (being able to averr this matter) he recover, yet the feoffees ſhall have the Land again, when the heirs come to age. The Lord not being able to averr this, ſhall render the feoffees their coſts and dammages.

32 H.8.c.1. Two Joyntenants or more, and the heirs of one holding of the King, and he that fee dieth, the King ſhall preſently have the wardſhip and marriage of the body of his heir, if he be within age. Saving to every woman her dower of two parts of thoſe lands, divided from the third part, as aboveſaid, and not otherwiſe, and ſaving to the King during the Wards minority, the reverſion of ſuch Joyntenants, and Tenants in dower.

Mag. Ch. C. 3. The heir being made knight within age, yet the land ſhall remain in the Lords cuſtody to the end of the term.

The wife ſhall be barred of her dower,

dower, both dower (a) at the Common law, and dower (b) *ex aſſenſu patris*, or (c) *ad oſtium eccleſiæ*; ſo long as ſhe detaineth the heir from him. But in pleading ſhe must ſhew the heirs name, and whether it be male or female.

(a) 2 *H.* 7. 6.
(b) 4 *H.* 3. *dow.* 174.
(c) 1 *H* 3. *dower* 187. 2 *H.* 7. 6.

Wardſhip of the body giveth the Wards marriage to the Lord, as a thing of meer right, pertaining to him. And that whether he will be married by the Lord or not.

2 *H.* 7. 9.

Statutes.

Merton C. 7. The Lord marrying the heir within fourteen years of age, in ſuch ſort as he be diſparaged, ſhall loſe the cuſtody and whole commodity of the wardſhip, if the Wards friends complain of it.

The heir full of age ſhall ſatisfie his lord for the value of his marriage, as much as any man would give, before he receive his Land.

Merton C. 6. An heir, after fourteen years of age, marrying himſelf without the Lords licenſe (who tendreth to him a covenable marriage) the Lord ſhall hold the land, after the heirs full age of one and twenty years, ſo long till he may receive the double value of the marriage.

Weſtm. 1. C. 22. The Lord may hold the land of heirs females, two years after their age of 14. within which two years, if

he marry them not, they ſhall go quite, without giving any thing for the Wardſhip or marriage. And if they will not accept a covenable marriage tendred by the lord, he ſhall hold the land till xxi. and over, till he have taken the value of the marriage.

4 and 5 Ph. and M. C. 18. A woman about 12, and under 16, agreeing to a perſon that contracteth matrimony with her contrary to the form of the ſtat. (which ſee fol.) the next of her kin to whom the inheritance ſhould come after her death, ſhall from the time of ſuch aſſent, have all the lands, &c. which ſhe had at the time in poſſeſſion, reverſion, or remainder during her life.

If one hold ſundry lands of divers Lords, the wardſhip of body goeth to the Lord of that land which the tenant held firſt. *F.N.B.* 142. Who is called a Lord by priority, and the other by poſteriority. And it is the feoffment of the land which maketh the priority: for the pleading is, That he holdeth the land of him *per antiquius feoffamentum*, then he holdeth the other land of the other. Therefore if the Tenant of lands holden by priority, maketh a feoffment in fee, and take an eſtate back again in fee, this land ſhall be holden by poſteriority. But if the Lord by priority grant his ſeigniory in fee, yet the tenure ſhall be of the grantee by priority. So though

though the grantor take an eſtate of the Seigniory back again in fee.

Prerogative.

The King ſhall have the wardſhip of body, though the tenure of him be by poſteriority. But his Grantee of the Seigniory ſhall not. 12 E.3.pr. 23.

The eldeſt child (a) whether Son or daughter, being heir apparent to the father, ſhall not be in ward for his body during his fathers life. But if one having a ſon, take a wife ſeiſed of Knights-ſervice, and hath another Son by her, and after the wife dieth; this ſecond ſon ſhall be in ward during his Fathers life, unleſs the husband be intituled to be Tenant by courteſie. (a) 33 H.6.55. F.N.B. 143.I.

Prerogative.

Tenure by Knights-ſervice in chief giveth to the King the wardſhip of all other lands alſo. And further (a) primer ſeiſin, or the value of them all by (b) half a year (if the heir were in ward) by a whole year (if he were not) (c) which primer ſeiſin muſt be paid, and relief alſo. Stamf.prer. 1. The ſtat. of prer.c.1.16. in this point but a declaration of the common Law. (a) 33 H.8. Br. ouſter le main 66. (b) Stam.prer. 14. (c) Br. relief 12.

Relief for land holden by Knights ſervice, amounteth to an C. ſh. for a whole Knights fee, to a C. marks for a Barony, and to an C. pounds for an Earldom.

Mag.

Mag. Chart. cap. 12. calleth this old Relief, and according to the old custom of the fees, which proveth that Statute to be but an affirmance of the Common Law.

Old Nat. Brev. per Br. relief. 13. If the heir be within age at the Tenants death, no relief shall be paid to the lords that are to have the Wardship. And if one hold of several common persons by Knights service, the Lords by posteriority, shall have no relief because they are to have the wardship of the Land holden of them, though the Lord by Priority only have the wardship of the body. But if in that case there be any Land holden by Knights service in chief, the heir at his full age shall pay relief to the other Lords. For there the King hath the Wardship of all his lands.

Prerogative.

33 *H.* 8. *Br.* 45. Grand Serjeanty, that is to say, Tenure of the Kings person, for every grand Serjeanty is a tenure in chief, being of none but of the King, to do unto him a more special service whatsoever by the person of a man, as to bear his *Lit.* 34. banner or lance, to lead his horse, to carry the sword before him at his coronation, to be his sewer, butler, or carver, to be one of the Chamberlains of the receipts of the Exchequer, or to find a man to warr for him whersoever within the four Seas, for if he can find none to do *b* 11 *H.* 4. 72. the service for him, he must do it himself, *Lit.* 36. is a special knights service in chief.

where

where the King instead of relief, shall have the value of the Land by a year. (d) *Lit.* 35. 11 *H.* 4. 72.

CHAP. VII.

Of Rent-Charge.

RENT-charge is a rent with liberty to distrain. As when a man seised of land granteth by a Deed Poll, or by Indenture, a yearly rent going out of the same land to another in fee or fee tail, or for term of life, &c. with clause of distress, or maketh a feoffment in fee by Indenture, reserving to himself a certain yearly rent, with clause of distress. *Lit.* 48.

CHAP. VIII.

Of Rent-Seck.

BARE hereditaments concerning land (for which no distress can be taken) are a rent-seck and common.

A Rent-service is a rent without liberty to distrain. As where a rent is so granted or reserved as before, without clause of distress. *Lit.* 48.

When a Rent is granted for equality of partition among Coparceners,

ners, as upon two houſes, one worth xx s. a year, the other worth x s. allotted one to the one coparcener, the other to the other; and that coparcener that hath the houſe worth xx s. a year, to pay v s. yearly to the other, this rent may be diſtrained for though no ſuch livery be granted.

The grant of a ſeigniory, rent-charge, and rent-ſeck, as alſo of the remainder or reverſion of any of theſe, or of the land it ſelf, is nothing worth without Attornment, that is to ſay the agreement of the tenant that preſently muſt be charged. *As* Lord, Meſne, and tenant; the Lord grants his ſeigniory, the Meſne muſt attorn, and not the Tenant prevail: for the Meſne is tenant to the Lord, Lord, and Tenant, the Tenant letteth the Land for life, or giveth in tail, ſaving the reverſion to himſelf: now if the Lord grant his ſeigniory, he in the reverſion muſt return to the grantee, and not the tenant for life or in tail; for he in the reverſion is Tenant to the Lord, and not the other. But if the Tenant had lett his land to one for life, the remainder in fee, there upon a grant of the ſeigniory, the Tenant for life muſt attorn, for he is Tenant to the Lord. So is not he in the remainder, whilſt Tenant for term of life liveth. If lands be lett for years, or given in tail, ſaving the reverſion: Upon a Grant of the reverſion, the Tenant of the land muſt attorn,

Lit. ch. attornm.

attorn. And an Attornment may either be by words; as to say, I agree or am content with the Grant; or I attorn to you, and become your tenant by force of the grant: or else by delivering to the grantee, a peny, half peny, or farthing in name of attornment, or by any other matter implying an agreement, as a surrender to the Grantee of the reversion, praying in aid of him, &c. And if such attornment be not to the grantee in the life of the grantor, the Grant is meerly void.

In the grant of a reversion depending upon a Free-hold, the attornment of the Free-holder is sufficient, though he be not the tenant that presently must be charged. As if lands be lett to a man for years, the remainder to another for life, and he in the reversion grant his reversion to another; the attornment of him in the remainder is sufficient. *Lit.* 128.

CHAP. IX.

Of Common.

Common is a profit to be taken in anothers land. As (a) feeding his beasts, &c. And if a man give to I. S. in frank-marriage with his daughter, Common for all his beasts, or other mens (if he should have none of his own) to do his business yearly, and to feed with the beasts of the grantor where they should go: there (a) 9 *H.* 6. 35.

there if the grantor come afterwards to have no beasts, yet the grantee shall have his common. But if the grant be whersoever the beasts of the grantor go, &c. there the grantee shall not have common, but when the other beasts are in common. Also upon a grant of common throughout a manner, yet he shall not common in garden, or land sowed, &c. nor take his common with beasts that are not commonable, as hogs, &c.

2 E. dow.

So of a common of estovers, that is to say, taking of reasonable house-boot, and hay-boot, &c. And such manner of profit (though they be appendant to the freehold) cannot be parted. For if such an heritage descend to parceners, one shall have the whole profits, & the other sisters an allowance. And the wife for her dower shall have but an allowance only.

Ibid. 2. E. 2.

Statutes.

Merton cap. 4. The Lord of waste, woods and pastures, may approve against his Tenant, if he leave sufficient common and pasture to his Tenants, with egress and regress according to his land.

Westm. 2. cap. 46. Such a Lord may approve in like sort against his neighbours which have common appurtenance, and for his Wind-mill: necessary increase of Court, or Court-lodge.

Hither

Hither belongeth chemin, or way over ones Land from one certain place to another, whether from close to close, or from his house, or the Kings high street, or church, and other Hereditaments of like nature.

CHAP. X.

Of Villanies.

THere hereditaments that concern the person, or meerly of the persons themselves, or by reason of the person.

Of the first sort are Villains. A Villain is such a servant as himself, and whatsoever he possesseth, Land, Rent, &c. but not things in action, as an obligation, debt, covenant, or warranty made unto him, is the Lords (a) if he claim it. But the wife which the villain marrieth after his purchase of land, and before the Lord enter, shall be endowed. And if he make a feoffment before the Lord enter, the feoffee shall retain it, and his Executors shall have the goods not claimed by the Lord in his life time.

22 *Ass. pl.* 37.

(a) 3 *H.* 4. 15.

19 *E.* 3. *Dow.* 171.

Statutes.

19 *H.* 7. *cap.* 15. Upon a feoffment made to the use of a villain, the Lord may enter into the land it self.

Prerogative.

Prerogative.

27 *Assp.* 49. **The Lord cannot seise his villain in the Kings presence.**

18 *E.* 4. 13. *b.* 18 *E.* 4 *ibid.* 19 *H.* 6. 32. **The children of a Villain are also Villains.** And if one confess himself a villain in Court of Record, the issue he had before are frank, but those born (*b*) after are villains.

41 *E.* 3. *vill.* 6. **Villenage beginneth by confessing a mans self to be one in a court of Record:** And therefore in a *Præcipe quod reddat*, if the Tenant say that he is Villain to I. S. and holds the lands in Villenage; the Demandant saith he is frank, &c. and he is found frank by the Jury: yet he remaineth a Villain to I. S.

11 *H.* 7. 13. *Lit.* 45. **A Villain is set free, we call it manumission or infranchisement, when the Lord enableth him to possess any thing against himself.** As by granting him an annuity, making an obligation or lease for years unto him, or a feoffment of any lands by deed, or without: and whether it be in fee-simple, fee-tail, or for life. But to make a lease at will unto him, is no infranchisement: for he hath no certainty of his estate, seeing the Lord may put him out when he will.

Statutes.

9 **Ric.** 2. cap. 2. In a suit by the Villain against his lord, the lords shall not be barred

barred of their Villains, because of their answer in Law.

CHAP. XI.

Of Annuity.

THose by reason of the person, are annuities, and Corrodies, or Office.

Annuity is a yearly Rent to be had of the person of the Grantor. As upon an annuity granted, or a rent out of his Coffers, or a rent out of land, without saying more. But if the deed be, That if A. be not yearly paid x s. at Easter, he may distrain for it in the Mannor of D. This is a Rent-charge (for the Mannor of D. is charged with a distress) but no annuity: nor the person of the Grantor charged, because he granteth not any rent, but granteth only that he may distrain. So if by expres words he insert in the Deed of the grant of a Rent-charge, *Proviso quod non extendat ad onerandum personam meam per breve de annuitate, &c.* *Lit.* 48.

CHAP. XII.

Of Corrody.

Corody is a partition for ones sustenance. Be it bread, ale, herring, a yearly robe, or sum of money for the robe. So of a chamber and stable for my horses, when the same is coupled with other things, as with certain messes of flesh, bread, ale, &c. But a chamber and stable themselves are not any Corrody. And in the first case they shall pass without livery and seisin, but not in the other.

a 25. *Ass.* pl 7.
b 31 *H.* 6. 16.
Ass. 16.

CHAP. XIII.

Of Office.

Office is a duty of attendance upon a charge. And therefore the grant of an office to an ignorant man, that hath utterly no skill at all, is meerly void. As if the King by his letters patents make a Clark of the Crown in the Kings Bench, which was never exercised in the Office, nor in any other Office there, & so utterly insufficient to serve the King & his people, the grant is void, and the Justices may

5 E. 4. *Rot.* 66. *per Br. office* 48.

may refuse him. So is the presentment of an unlearned man to a Church meerly void. Likewise the *Non-feasance* and the not attendance upon an office, hath a condition in Law annexed to it. As if the Marshal suffer but one voluntarily to escape of the prisoners, it is a forfeiture. But in negligent escapes what shall make a forfeiture of the office, & what not, both for the number of negligent escapes, and for the greatness & smallness of them (as if some that escape were committed unto him for surety of peace, & were suspitious men) lieth wholly in the discretion of the Court: & the King may himself have an office: as a forrestship granted to one in tail, the remainder to the King & his heirs is good: for although he cannot in respect of the Majesty of his person, exercise the office himself; yet he may grant it over to one that may exercise it. 39 *H.*6.31. 1 *H.*7.19.

Statutes.

5 *E.*6.c. 16. The office or deputation of any office, or any part thereof, which concerneth the administration or execution of Justice, or the receit, controlment, or payment of the Kings money, &c. or surety of the Kings lands or customs, or any administration of necessary attendance in the Kings Custom house, or the keeping of the Kings places of strength, or the Clarkship of any Court of Record, shall not be bargained & sold, or any reward or agreement of reward taken for it, upon pain, that

the seller, &c. shall forfeit all his interest in the office or deputation, &c. And the buyer be a disabled person, to occupy or enjoy the same: And all bonds, &c. to be void, as against him by whom they are made. Provided, That all acts executed by any person offending before he be removed from his office, &c shall remain good.

This Statute extendeth not to any office of inheritance, nor to any Parkership, nor to any offices to be given by the chief Justices of the Kings Bench, or Common place, or by any Justices of Assise.

CHAP. XIV.

Of Franchises.

(a) 15 *E.* 4. 7. 4 *El. Pl.* 219. 6 *E.* 3. *per* 30. *H.* 8. *Dy.* 44.

BEside the hereditaments already handled (a) there be certain other derived from the Kings Prerogative, which are termed Franchises. For all Franchises are derived from the Crown: and therefore are extinguished, if they come to the Crown again by escheat, forfeiture, &c. For he greater drowns the less.

22 *Ass. pl.* 34.

A Franchise is a royal priviledge in the hands of a common person: so we call every subject: and is forfeited by misusing of it. As keeping Fair or Market upon Monday, when Wednesday is granted

granted him: or keeping Fair upon two days, when he hath but one granted: for that is a miſuſer. But keeping market upon a Monday and Wedneſday, when only Wedneſday is granted, is a forfeiture but of that which he uſurps more than is granted; claiming a Fair. &c. for two days by patent, when only one is granted, is a forfeiture of both. But if he claim one by Patent, and another by Preſcription, and this latter found againſt him; yet he forfeiteth but that day only. Miſuſing of any point, where there be many in one Franchiſe, is a forfeiture of them all. But not where the Franchiſes are ſeveral. But *non uſer* of a market. &c. is no forfeiture of it, as it is of the Office of the Clark of a Market, and ſuch like, which of neceſſity muſt be uſed.

2 *H.*7. 11.

22 *Aſſ. ibid.*

2 *H.*7. *ibid.*

Statutes.

27 H. 8. c. 24. No ſubject ſhall have authority to pardon any felony, or any Acceſſaries to felony, or any outlary for ſuch offences. Nor to make any Juſtices of Eyre, Aſſiſe, Peace, Goal delivery. All original Writs, inditements of Treaſon, Felony, & Treſpaſs, and Proceſs upon the ſame, ſhall be only in the Kings name. And the *Teſte* in his name that hath the Franchiſe.

Every Writ and Enditement, whereby a thing is ſuppoſed to be done againſt the Peace, ſhall be ſuppoſed to be done againſt the Kings peace only, and not againſt the peace of any ſubject.

The King shall have all fines, issues, amerciaments, and forfeitures lost by any Offices of Franchises for *non* execution, or insufficient returns of process, or for any misdemeanor concerning their office, with many provisoes in the same Statute.

The kinds of Franchises are divers, and almost infinite.

9 *H.*7. 11. **Of** such sort are the liberty of having a Court of ones own; of drawing causes out of the Kings Court into his own. In the first case we call it *tenere placita*, when he is to hold it before his Bayliff in such a place, and therein a man may prescribe.

35 *H.*2.56. (In the other case we call it *Conisance of plea*: and that lieth not in prescription but in demand, and is always of Record) of returning Writs, &c. Also Warrens which a man may have in anothers land, as well by the Kings grant, as by Prescription. And if the King grant to one Warren in his

(*a*) 2 *H.*7. 11. land, and afterwards the grantee alien the

22 *Ass. pl.*34. land, reserving the Franchise. **Markets**

(*b*) 9 *H.*6.45. (a) **Fairs**, toll, (b) **of every buyer for**

(*c*) 28 *Ass. pl.* **things he buyeth there**, not (c) **bring**

53. **for his own expences.** For (d) neither

(*d*) 9 *H.*6.45. shall the seller pay toll, but the buyer: neither shall a man pay toll for the things he bringeth to the Fair, but for the things he selleth. But by custom he may for every thing brought to the Fair, and for his standing also. **And whatsoever liberties or commodities else that (created first by the Kings special grant,**

grant, or of their own nature belonging to him) are given to common persons to have any manner of estate in.

CHAP. XV.

Of Chattels: where, of Testaments.

SUch then is the nature of an hereditament in his sundry sorts and kinds.

Chattels are possessions, wherein there cannot be several estates.

All ones own Chattels real, as (a) a Lease for years, &c and personal, as corn (b) growing upon land, but not trees, for they are parcel of the Freehold, &c. whether in possession, or that any is indebted to him in, but not those he is only to recover dammages for, as in goods taken from him, or to be accounted for (c). Neither could the Executor at the Common Law have an action of account or trespass *de bonis asportatis in vita testatoris.* may be given away or devised by his Testament; otherwise called his last Will: and the things devised are Legacies.

(a) 20 E. 4. 9.
(b) Park. 99.
(c) 7 El. Pl. 290.

Testament is an appointment of some person, whom we call an Executor, to administer them for him after his death. For without naming

37 H. 8. B. tit. 20.

Executors; or if they all refuse it, it is no Will at all: yet the legacies shall be paid in both cases, and the Testament annexed to the Letters of Administration. But is a good will of land though no Executor be named: for land is not testamentary. And administration is it which makes an Executorship: That if one make three Executors, and will that none shall administer but only one; this one is sole executor. Also this administration is for the Testator and his use, so as the Executors themselves cannot make their Will (*a*) of these goods, nor (*b*) partition between them, &c. nor the husband which marrieth a wife that is an Executor, shall have those goods by entermarriage with her: neither shall the Executors forfeit them by outlawry. Therefore Executors represent the person of the Testator. So as a villain executor may have an action of debt against his Lord, for debt due to the Testator. And outlary excommengement, &c. is no disablement to bring an action as Executor. And all of them are but one person: whereupon it is, That the release or attornment of one is good for both: that in an action brought against them, as debt, covenant, and such like; one cannot answer without the other by course of the Common Law: and that they cannot have every one by himself a several plea in abatement of the Writ, &c.

3 *H.*6.7.

(*a*) 19 *El. Pl.* 325.

(*b*) 17 *H.*8.22. 21 *H.*7.29.

10 *E.*4.1.

*Littlet.*41.

(*a*) 21 *H.*6.30.

(*b*) 42 *E.*3.13

(*c*) 48 *E.*3.14.

(*d*) 32 *E.*3. *Quid juris clamat.*

(*e*) *Till the Statute* 9 *E.* 3. *cap.*3.

36 *H.*6.17.

Yet their power, both for the time when, and the things which they shall administer, may well enough be divided. As a man

32 *H.*8. *B. Exec.*155.

may

may make *A.* & *B* his executors, & that *A.* ſhall not intermeddle during the life of *B.* or make one his Executor touching his goods in D. and another his Executor, touching his goods in S.

Statutes.

32 H. 8. cap. 1. He that hath lands, tenements, or hereditaments in Socage, and none holden by Knights Service, or Socage in chief, may deviſe all by his will in writing, or give all by an Act executed in his life. So may he that hath land holden by Socage in chief, and other holden of a common perſon by Socage, and none holden by Knights-ſervice: ſaving to the king, *primer ſeiſin*, relief, ſuing of the ſame out of the Kings hands; fides for alienation, &c. and all other duties for the Socage in chief, as before hath been accuſtomed.

He that hath lands, &c. holden by knight-ſervice (whether he have other lands holden of the King, or of any other perſon, by Knight-ſervice, or otherwiſe, or not) may do the like for two parts in three to be divided in certainty for the advancement of his wife, children, and payment of his debts. Saving to the King the Wardſhip or *primer ſeiſin*, of the third part, without any charge, dower, &c. and fines for alienation.

He that hath lands, &c. holden by knight-ſervice (whether of the King alone by a Knight-ſervice not in chief, or of a common perſon, or ſome holden of the King, ſome of a common perſon) and other lands in

in Socage, may devise by Will, or give by any Act executed in his life, two parts of that holden by knights service, and all the Socage: Saving to the Lord of the land holden by Knights service, the wardship of a full third part thereof, without any charge, dower, &c.

Provided, That every one shall sue his livery, relief, and heriot, as if this act had never been made.

34 H. 8. cap. 5. The former Statute shall be extended to inhable devises or other acts only of lands in fee-simple.

And if the party that maketh the Will or other act, be seised in Coparcenary, or in common, it shall be good for so much as in himself of right is.

The wardship, relief, primer seisin, &c. shall be of lands that descend immediately after the death of him that maketh the will or other act, as well in fee-tail, as in Fee-simple: and the devise of two parts residue shall be good, though it be of all his fee-simple lands. Such a will shall be good for two parts (in case only where two may be devised) though it made for the whole, or more than two parts.

Such wills made by any woman covert, or person within 21 years of age, Ideot, or *non sanæ memoriæ*, shall not be good.

And so some other things there, for the explanation of the former Statute.

Westm. 2. cap. 23. Executors from henceforth shall have a Writ of account, and

and like action and proceſs in the ſame writ, as their teſtator ſhould if he had lived.

4 E. 3. cap. 7. Executors ſhall have an action for a treſpaſs done to their teſtator: as of his goods and chattels carried away in his life, and recover their dammages in like manner, as he whoſe Executor he is ſhould have done if he had lived.

The Executors muſt prove (a) or make probate of the Will (to be a true one) in the Spiritual Court, and be (b) ſworn to ſee it performed. (a) 21 E. 4. 24. (b) 21 El. Pl. 544.

If many Executors be made, and one refuſe; yet he may adminiſter at his pleaſure, and the other muſt name him in every action for any duty due unto the Teſtator, and his releaſe ſhall be a barr of the whole duty. And if he ſurvive the other Executor, he ſhall have the action, and not the Executor of him that died. 21 E. 4. 23.

Otherwiſe it is if they all refuſe, for there the Teſtator dieth inteſtate. 36 H. 6. 9.

But an Executor, once adminiſtring, as if he ſell land in uſe, appointed by the will to be ſold, and the money to be diſpoſed, &c. can never refuſe after. 9 E. 4. 47.

Executors muſt anſwer all certain duties of the Teſtator, but not for a treſpaſs done by him, burning of a Writing bailed unto him by Deed indented, receit (c) of rents, or occupation of other mens lands, as Bailiff having ſufficient of his Chattels, which we call aſſets entermains, to do it. And therefore (a) 11 H. 4. 46.

(c) F.N.B. 117.c. fore shall be charged of their own goods, if they waste the Testators.

2 H.6.12. 11 H.7.12. — But so, as duties that grow by specialty are to be answered before other duties, and legacies to be last of all delivered: without which delivery, the devisee

21 E.4.21. (d) 20 E.4.9. (e) 2 E.4.30. 37 H.6.39. can neither enter (d) into a Term, nor take (e) a chattel personal devised to him. But upon a lease devised for twenty years to one for the first x. years, the remainder

20 El. Pl. 519. or remnant of the term to another: or devised to one for so many years as he

20 El. Pl. 539. shall live, the remainder to another: a Delivery to the first Devisee serveth for him in the remainder also. So, though it be but the occupation of a term, which is so devised: for the occupation and profits of the land is all one with land it self.

37 H.6.30. & per 20. El. Pl. 521. But if the occupation of a Book, Glass, or other chattel personal be devised to one for life, and after his death to another in like sort, there a delivery to the first, is no delivery to the other, for their occupations are several, and in such Chattels personal, the occupation is distinct from the property.

13 H.7.13. — In these devises the Testators intent standing with the rules of Law shall be taken. As where a man deviseth Lands (devisible by custom) to his son and heir after his wives death; the wife hath an estate during her life by implication, in the intent of the devise. A devise

deviſe to one and his heirs males, is an eſtate tail.

But a deviſe to I.S. in fee upon condition, if he pay not to I. D. a certain ſum of money, then I. D. to have it in fee, is a void condition and remainder, for it is contrary to law. But a deviſe of the Fee-ſimple to Alice S. and after her death to B. is only an eſtate for life, the remainder for life to B. the remainder to Alice in fee. So as the husband of Alice (if ſhe dy in the life of B.) cannot be tenant by courteſie. 27 *H.* 8. 27. 29 *H.* 8. *Dy.* 33. 19 *El. Dy.* 357.

The Executor of an Executor is Executor to the firſt Teſtator, and may have an action of debt for the arrearages of an annuity due unto him. 10 *E.* 2. *Ex. c.* 110.

Statutes.

25 E. 3. cap. 5. Stat. 4. Executors of Executors ſhall have Actions of debt, account, and of goods carried away of the firſt Teſtators: and execution of Statute merchants, and Recognizances made unto him.

If no will be made, the Ordinary ſhall adminiſter all the chattels that were in his poſſeſſions. For he which had the charge of his Soul in his life, is preſumed the fitteſt perſon to have the care of his diſpoſing the goods in *pios uſus* after his death; and therefore the ordinary may ſeiſe the goods, and muſt keep 7 *El. Fl.* 277.

keep them without waſting, and may gi
alien, or ſell them at his will, and diſpo
the money coming thereof *ad pios uſ*
and if he do not ſo, he breaketh the con
dence which the Law repoſeth in him. I
yet his gift or alienation remaineth goo
by law. Howbeit being a ſpiritual G
vernor, he ſhall not be ſubject to tempor
ſuits, nor have any action of debt or othe
wiſe for any thing due to or by the in
teſtate.

Statutes.

Weſtm. 2. cap. 19. The ordinary ſhall
anſwer for debts wherein the inteſtate
was bound, as Executors ſhould.

— 31 **E. 3. cap.** 11. The Ordinaries ſhall
depute next friends of the inteſtate to ad
miniſter his goods, who ſhall ſue and be
ſued, and be accountable to the Ordina
ries, as Executors ſhould.

— 21 **H. 8. cap.** 5. Adminiſtration ſhall be
committed to the widow of the Inteſtate,
or to the next of his blood, or to both, at
the diſcretion of the Ordinary. Where
divers perſons next of the blood (which
indeed are in equality of degree, with the
inteſtate) claim adminiſtration, or where
one only claimeth it as next of the blood
(where in truth divers are in equality of
kindred, as aforeſaid) the Ordinary ſhall
be at his choice to accept one or more,
making requeſt. Where but one or more,
and

and not all (being in equality of kindred) make request, the Ordinary shall be at liberty to admit the Widow, and him or those only making request, or any one of them, at his pleasure. The Ordinary shall commit administration according to the rule sforesaid, upon pain of ten pound.

The Statute Mag. Char. cap. 18. is, — That the Kings debts shall be levied of the dead mans goods, and the surplusage delivered to the Executors *Salvis pueris, & uxori rationabilibus partibus*, which proveth that this *rationabili parte* was at the common law.

But (a) whether any will be made or no, his wife, and such children as are not advanced by him in his life (as if a daughter be covenably married by him, this is a sufficient advancement) shall have a part to their own use; that is to say, one third of all (after his debts paid) to his wife, and the other to his children. And a Writ *de rationabili parte bonorum* is given to recover it.

(a) *Mag. Char. c.* 28. 16, *&c. ut in F. N. B.* 122. *l.* 4. *Br. ration. par.* 6.

(b) 3 *E.* 3. *det.* 156.

CHAP.

CHAP. XVI.

Of Chattels Real.

CHattels are Real, or Personal. Real, as terms for years, and wardships, whereof we have spoken before.

CHAP. XVII.

Of Chattels Personal.

PErsonal as Plate, Jewels Silver, Gold, Implements of Houshold, Cattel, and all goods and moveables whatsoever, Corn sown upon the ground &c. For that is devisible by will, shall be forfeited in outlawry of debt or trespass.

Park 99. 5. *H.* 7. 10.

The Ownership of a chattel personal is termed a property, which of wild beasts both Fowles of the air, Fishes in the Sea, Beasts upon the Earth, and generally all Fowl of Warren, Feasants, Patridges, Deer, Conies, Hares, and such like, cannot be in any, and therefore it is no felony to steal them: and a writ of Trespass shall be *Quare Warrenam suam intravit & mille lepores cepit*, without saying *suos*, Nor after they are made came, longer than they remain

3 *H.* 6. 55. 12. *H.* 8. 3. 18. *H.* 8. 2.

For fowl of Warren.

12 *H.* 8. 3.
18 *H.* 8. 2. 3.
H. 6. 55.

remain in ones poſſeſſion. As my tame Hound that followeth me, and is with my ſervant, my Hawk that is flying at a foul, my Deer that is chaſed out of my Park or Forreſt, and the Forreſter maketh freſh ſuit, theſe all remain in my poſſeſſion, and the property is in me: but if they ſtray, it is lawful for any man to take them. Otherwiſe it is of Hens, Capons, Geeſe, Ducks, Peacocks, &c. 12 *H.* 8. 3. 12 *H.* 8. 11. 12 *H.* 8. 3, & 11. 18 *H.* 8. 2.

Prerogative.

Treaſure hid in (*a*) **the earth,** not upon the Earth, nor in the Sea, **and** (*b*) **coyn** though not hidden, **being found** (*c*) **is the Kings:** we call it treaſure-trone. (*a*) *Stamf.* 40. (*b*) 27 *Aſſ. pl.* 19. (*c*) 10 *El. Pl.* 322.

Cattel alſo that ſtray into anothers land are the Kings after a year and a day, if being proclaimed at the Market in ſeveral towns next adjoyning, the owner do not claim them. For if a Lord keep a ſtray three quarters of a year, and yet within the year it ſtrayeth again, and another Lord getteth it, the firſt Lord cannot take it again: for till a year and a day paſt, and Proclamation made, he hath no property. And therefore the poſſeſſion of the ſecond Lord is good againſt him. 2 14 *H.* 6. 5. 31 *E.* 3. *eſtray* 4. *Br. eſtr.* 10. 33 *H.* 8. *Br. eſtray* 4. *Stamf. prer.* 37.

Goods wrecked are alſo his. — *and D. St. prer. Br. wreck* 3. *that this was at the common Law.*

Statutes.

Weſt. 1, c. 4. Where a man, dog, or cat

cat escape alive out of ships, it shall be no wreck. But the things shall be prized by the Sheriff or Coroner, and delivered to those of the Town where they be found, to answer for them. So as if any within the year and day prove that the goods be his, they shall be restored to him.

10 *El. Pl.* 322. **The King being Tenant in Common of an entire Chattel personal, shall have the whole.** As if an obligation be made to two, or two possessed of a horse, and one is attainted, the King shall have the whole duty of the obligation, and the horse.

(*i*) 7 *E.* 4.13. 38 *H.* 8. *Br. denizen* 10 8. 16.20. **Goods that belong to an alien enemy,** (*i*) **any body may seise to his own use.** But an alien born in amity may have property in goods, and buy & sell, & their bargains good: and may also bring personal actions.

7 *E.* 4.13. **The taking of goods by an alien enemy in battel, devesteth the property from the owner, if he come not before Sun set to claim them.**

12 *H.* 7.27. **Churchwardens are enabled to have goods to the behoof of the Parish.** For they are charged to find divers things belonging to the Church, as ornaments, and such like: And therefore in reason they should be enabled to purchase goods. And thereto extendeth their Corporation. And

(*a*) 8 *E.* 4.6. all the Church goods, as (*a*) books and or-

(*b*) 11 *H.* 4. 12. naments (*b*) bells hung up in the Church,

(*c*) 11 *H.* 4.12. are theirs, and (*c*) they may have an appeal

(*d*) 8 *E.* 4.6. of robbery of them, or a (*d*) trespass, and count,

count to the dammage of the Parishioners. But they cannot give or release them, for that is to the disadvantage of the Church. And if they do, the Parish may chuse new Church-wardens, who shall have an action of account against them(g) But Church-wardens are not enabled to make a feoffment, a lease for life, or perhaps for years, or such other things as have continuance.

13 *H.*7.10. (*f*) 8 *E.*4.6. (*g*)12 *H.*7. 27.

CHAP. XVIII.

Of Baylment and Contracts.

TO Chattels personals, Bailment, and Contracts do belong; Baylment is a delivery of goods in possession, and is either to keep or employ. To keep, when only the custody is committed to him, and is a simple Baylment or pledge.

A simple Baylment, when he receiveth them to keep for another: whether it be for the Bailor to re-deliver him again: in which case the Bailor may retake them without request: or for a stranger to bayl them over to him. In which case, before such bayling over, the Bailor may countermand the Bailment, and command the Bailee to deliver them him again, and shall have an account upon refusal. For in neither of these cases the property is out of the Bailor.

5 *H.*7.18. 1 *E.*5.2.

A pledge is when he receiveth them—

5 *H.*7.1.

them in assurance for another thing had of him at the time. As to take a chain of gold for money then delivered, &c. but not for satisfying of a debt he oweth. But the property of the pledge remaineth in the owner; for he shall bear it, if it be casually lost or broken: and the other that hath the pledge, shall not be attached by it, in as much as he is not owner.

— The bayment of goods to employ is, when the Bailee hath the things themselves to use to anothers profit. As to sell *meliori modo quo poterit, &c.* Where, if he sell that for 12 *l.* which is worth 1600 *l.* and refuse a better price, the party hath no remedy.

Contract is a mutual agreement for the very property of personal things, where the duty growing upon it cannot be apportioned. As if I sell my own horse and the horse of I. S. to one for x *l.* and I.S taketh his horse from the vendee, yet the vendee must pay me the whole x *l.* Of this kind of contracts are buying and selling, borrowing and lending, and such like. and in all these cases an action of debt lieth.

— The sale of another mans goods in open market (we call it market overt) without Covin or notice whose they are, altereth the property, if toll be paid for it.

Hither belong certain (as it were) contracts in Law, though not

not ariſing from the ſpecial agreement of the parties. As he that findeth anothers goods, is chargeable by reaſon of the poſſeſſion to him that right hath: he that receiveth money to ones uſe, or to deliver over to him, is chargeable as a receiver. He that entreth into land of his own head, and receiveth the profits of it, or parents that occupie land purchaſed by an Infant, are chargeable as Bayliffs. And if a Liberate be delivered to the Clark of the Hamper, who hath aſſets in his hands, an action of debt lieth againh him. So doth it upon every judgement.

CHAP. XIX.

Of Accord and Arbitrement.

THeſe are the things which belong to Chattels perſonal in general: for the intereſt of perſonal things, uncertain accord (otherwiſe called a concord) and arbitrement lie. As of a treſpaſs done, for the dammages are uncertain; but of debt or dammage recovered in certain it is otherwiſe, unleſs it be joyned with treſpaſs or other things uncertain: for then all put together, lie in arbitrement or concord. So of Waſte, detinue of charters of land, which are things in realty, annuity, &c. they lie not in arbitrement or concord.

Accord is an agreement between

the parties themselves: not by mediation of friends; for then it is an arbitrement upon a satisfaction executed. As for one at his own cost to agree, I.S. and another, whom I.S. hath trespassed; this may be a satisfaction to I.S. Otherwise it is, if he do but endeavour to agree them. And this satisfaction must be executed: for a tender (a) of money without payment, or an (b) agreement to pay money at a day to come, is no satisfaction before the day come, and the money be paid: nor shall be pleaded in bar of an action of Trespass: for upon an accord, the party hath no means to compel him to pay it, as he hath upon arbitrement. But being paid at the day, it is a good plea, if the other afterwards bring an action.

15 *H.6. accor.* 1.

(a) 17 E 4. 8.

(b) 6 *H.* 7. 11.

(c) 16 *E.* 4. 9.

19 *H.* 6. 36.

Arbitrement is an award of satisfaction by others whom they chuse to judge between them. As to arbitrate because *A.* (one of the parties) hath done a greater trespass to *B.* (the other party) than *B.* hath to him; therefore that *A.* should give *B.* money in satisfaction, and *B.* be quit against him, is a good award. But that one shall be *non suit* in an action, is not good; for after *non suit* he may begin again, whereas the arbitrement (which must be in some sort a satisfaction for the dammages) ought in that respect to be a determination of things awarded; where the award of a personal chattel altereth the property thereof.

So

So as he may have a detinue (a) for it, or debt if it be of money, or such like, to be paid for (b) a debt due, or (c) amends of a Trespass. And therein an arbitrement differeth from an accord. But an award of an Acre of land, &c. is not good unless the acre be delivered.

(a) 2 *El. Dy.* 183.
(b) 16 *E.* 4. 9.
(c) 19 *H.* 6. 38.

Et jam prima mei pars est exacta laboris.

THE THIRD BOOK OF LAW.

CHAP. I.

Of a wrong without force.

FOR of poſſeſſions (the firſt and hardeſt part of Law) we have hitherto ſpoken ſufficiently. The other reſteth, which miniſtreth Juſtice in the puniſhment of offences

An offence is the doing of any wrong. And is a wrong without force, or to the which force is coupled

In thoſe of the firſt kind, the offender is to be amerced, or to pay a petite ſumm of money to the King. And (a) if he be a Lord of the Parliament (whom we call a Peer of the Realm) then a C.s. As if (b) ones writ abate, or if in (c) an Action of Treſpaſs

(a) 38 E.3.31. 9 H.6.2.
(b) 38 E.3.ib.
(c) 9 H.6.ibid.

paſs againſt two, for hunting and taking two Deer, one Defendant be found not guilty, the other guilty of taking only one Deer; here the Plaintiff (if he be a Peer of the Realm) ſhall be amerced CC. s. one C. s. againſt him that was found not guilty at all: the other hundred ſhillings againſt him that was acquitted of one of the Deer.

The Kings wife ſhall never be amerced. And therefore a writ brought by her is good enough, though this clauſe, *Si fecerit te ſecurum*, be left out, for ſhe ſhall not be amerced for her *non ſuit*. 18 *E.* 3. 2. *br.* 355.

CHAP. II.

Of Treſpaſſes upon the Caſe.

OFfences without force are treſpaſſes upon the Caſe, or Real wrongs.

Treſpaſs upon the caſe is ſuch an offence, whereby any thing is endamaged. And is a miſuſer or deceit.

Miſuſer, when by meer wrong it is endamaged. Of which kind there be many, and thoſe of divers ſorts. As if a man maliciouſly utter any falſe ſlander to the indangering of one in Law. As to ſay, he hath reported that money is fallen, for he ſhall be puniſhed for ſuch a report, if it be falſe. The touching of him with ſome hai- 9 *El. Vttings caſe.*

noug

nous crime, as that he hath gone about to get poiſon to kill the child that ſuch a woman goeth with (yet it is no felony;) lien (a) in wait to rob him; procured (b) another or agreed (c) with another to murder him (though he were not murthered in Deed) (a) ſought his life for his land, &c. or the impairing his trade of life; as to call a merchant (e) bankrupt (for it is his living, but ſo it is not of a Gentleman;) an Attorney (c) Ambodexter, or to ſay that he dealeth (d) corruptly. But in all ſuch caſes words of choler and heat, as to call one Coſener (e) and Crafty knave, common extortioner, and drunkard, witch, rogue, Pillory-knave, Villain (unleſs he ſay villain to ſuch a man, or regardant to ſuch a mannor;) words uttered in a ſuit of law, as to bring a Writ of forger of falſe deeds againſt a nobleman, or any other (though it be falſe) will bear no Action; for theſe are not maliciouſly. So if he be able to juſtifie the words, for then it is not falſly. As that he called him perjured, by reaſon of a perjury committed in the ſtar-chamber, murderer, thief, or ſuch like, upon a conjunction (f); but not upon an Enditement or common voice and fame, though the defendant himſelf ſuſpect him. If one having another mans goods (h) convert them to his own uſe: if a (i) Sheriff ſuffer one in

Sir Tho. Cokains caſe.
(a) So it hath been adjudged.
(b) 26 El. Cracknel 5 c.
(c) 34 El. Cebet againſt Haines adjudged.
(a) 27 El. Hack's caſe.
(b) 27 El. Barrons caſe.
(c) 26 El.
(d) 27 El. Bure. caſe.
(e) All theſe caſes have ſo been adjudged or commonly received for Law. 13 H. 7. per 11. El. Dy. 285. 30 H. 8. Br. Act. ſur caſe 104.
(f) 31 El. Nowels caſe.
(g) 7 El. Dy. 236.
(h) It hath been oftentimes adjudged that in ſuch caſes the reverſion is traverſible. (i) 7 H. 6. 5. & 17 El. in Manſers caſe no action of debt lieth upon it (at the Common Law) but an action of Treſpaſs upon the caſe.

in execution for debt to go at large: if a Smith (k) clop my horſe: but not if he take him to cure (without warranting of him) and doing all he can, yet the horſe impair. If being committed to the Goal, the Goaler of malice put upon me ſo many Irons, or otherwiſe uſe me ſo hardly that I become lame thereby, &c.

(k) 48 *E.* 3. *b.* *F.N.B.* 93. *H.*

Statutes.

Weſt. 1. cap. 33. He that publiſheth any falſe news and tales, whereby diſcord or occaſion of diſcord and ſtander may grow between the King and his people, or the Nobles, ſhall be kept in priſon until he hath brought him forth into the court, that did ſpeak the ſame.

2 R. 2 c. 11. The like for him that telleth falſe lies of Nobles and great Officers of the Realm, whereby diſcord may ariſe between the ſaid Lords and Commons.

12 R. 2. c. 11. In the caſe of theſe former Statutes, if the party cannot bring forth him that ſpake the ſame, he ſhall be puniſhed by the advice of the Councel.

But two above the reſt do here require more ſpecial conſideration; that is to ſay, diſturbance and nuſance.

Diſturbance is the hindering of that which in right belongeth unto one to do. As for a man to uſe his common, to reduce a Water-courſe that is miſturned,

misturned, to present unto a Church, &c.

F.N.B. 184. *a.* F.N.B. 184. *d.* **Nusance is annoyance done to ones hereditament.** As levying a fair or market to the Nusance of another Fair, or Market; building a house so near mine, that the rain which falleth from that house falleth upon mine, &c.

(*a*) 33 *H.* 6. 26. (*b*) 42 *Ass. pl.* 5. **All manner of nusances are to be removed, and common nusances.** As a wall (*a*) &c. built upon the Highway, trees (*b*) growing upon the river bank, whereby a water-course is stopped, any man may pull down.

F.N.B. *in his Writ of deceit.* **Deceit when the dammage groweth by an undue sleight.** As if a man purchase a writ in my name out of the Chancery, I not knowing of it, whereby I am to pay a fine; or if one (whom I make my Attorney in a plea of land against finee) make default, whereby the land is lost: Or if in a *Præcipe* against divers Tenant, a man purchaseth a protection for one of them, supposing him to be beyond sea in the Kings service, where indeed he is & always hath been in England, by means whereof the demandant is delayed: or if in a *Præcipe quod reddat*, the Sheriff return the Tenant summoned, where indeed he was not, whereby he loseth the land: or if in play one win anothers money with false dice, or if he that selleth any thing do upon the sale, warrant it to be thus and thus, whereby the other is deceived

cribed. So that the warranty must be parcel of the contract: for if it be (a) after, (at another place) or (b) a servant make the warranty upon the sale of his masters goods (which in law is the masters sale, and warranty of the servant) it is a void Warranty, and no action of deceit lieth upon it. Also the Warranty can reach but to things in being at the time, not to things to come: as that a horse (c) will carry you xxx. miles a day: nor to things which may be discerned by my five senses to be otherwise, as clothes of murry colour to be blew, unless the buyer in this case be blind. But where they are warranted to be of such a length, and are not, there an action of deceit lieth: for that cannot be discerned by sight, but by a colateral proof, the measuring of them.

(a) 5.7.41. (b) 11 E. 4.6.

CHAP. III.

Of certain offences punishable by amercement by the Kings Prerogative.

CErtain offences against the Law, are in nature of trespasses upon the case, and by the Kings prerogative punishable like to them. As suing an action without just cause, or giving just cause of an action: for (a) in every action where the matter passeth against the Plaintiff (be it by verdict, demur, or otherwise) the Plaintiff is to be amerced, and the Defen. in debt, detinue, covenant, replevin,

(a) So are all precedents.

Quid

(b) 11 *H.* 4. 45. (c) 22 *ass. pl.* 32. (d) 7 *H.* 6. 36. 40 *E.* 3. 20. (f) 10 *E.* 4. *br. amerciamen.* 46.

Quid juris clamat, &c. (b) but not in Treſpaſs, for there he ſhall be fined and impriſoned. Non-ſuit (c) in an action (d) fault in the original writ he bringeth: or (by the Sheriff) in the return of a Writ making (f) default when he ſhould appear (as the Jurors at the *Habeas corpora*) and whatſoever other offences (not being with force and arms) which offer no direct injury to a common perſon.

CHAP. IV.

Of diſcontinuance.

HItherto of Treſpaſſes upon the caſe. A real wrong is that which medleth with the Freehold otherwiſe than it ought, and is a diſcontinuance or ouſter.

Diſcontinuance, when he that hath an eſtate tail, or Fee-ſimple in anothers right, as the husband in right of his wife. A Dean ſole ſeiſed in the right of his Deanrie, Dean and Chapter, Gardein and Chaplains; as alſo Major, and Comminalty of lands in the right of their Corporation, maketh a larger eſtate of the land than he may. As by a Fine or Feoffment for life of the Leſſee, in tail or in fee, which is called a diſcontinuance. But the Grant of a Rent, releaſe or confirmation to a Leſſee for years in fee, make no diſcontinuance, for they

paſs

paſs without livery, and therefore paſs no greater eſtate than the Grantor had.

Statutes.

32 H.8. cap. 28. All leaſes by deed indented for life or years, by any perſon of full age, having an eſtate in fee or in fee-tail, in his own right, or in the right of his Church, or wife, or joyntly with his wife, ſhall be perfectly good.

This extendeth not to Leaſes of land in the hands of any Farmer, by vertue of any old Leaſe, unleſs the ſame be expired, ſurrendred or ended within a year after the making of a new; nor to the grant of any reverſion, or to any leaſe of land which hath not moſt commonly been letr, or occupied in farmby the ſpace of twenty years next before, nor to any Leaſe made without impeachment of Waſte, or made for above twenty years, or three lives from the day of making. And that there be reſerved yearly payable to the Leſſors, their heirs and Succeſſors, according to their eſtates, the rent accuſtomably yielded within twenty years next before: which heirs and ſucceſſors ſhall have the like advantage againſt the Leſſees, their Executors and Aſſigns, as the Leſſor himſelf might. Provided the wife be made party to every leaſe by the husband of any land of her inheritance. The leaſe to be made by Indenture in both their names, and ſhe to ſeal the ſame, and the rent to be reſerved to the husband and

and wife, and her heirs, according to her eſtate of inheritance.

— 13 El. c. 10. All Grants, Feoffments, Leaſes, and other conveyances and eſtates, by any Maſter or Fellows of a Colledge, Dean and Chapter, Maſter or Gardein of an Hoſpital, Parſon, Vicar, &c. other than for xxi. years, or three lives, from the time of ſuch leaſe or grant, reſerving the accuſtomable yearly rent, yearly payable, ſhall be void.

— 14 Eliz. cap. 11. The Statute 13 El. c. 10. before, ſhall not extend to grant aſſurance, or leaſe of any houſe in City, Borough, Town corporate, or Market Town, or within the Suburbs (the ſame not being their dwelling houſe, or having above ten acres of ground belonging to it.) Provided the leaſe ſhall not be made in reverſion, and the accuſtomed yearly rent ſhall be reſerved, the Leſſees charged with reparations, and it ſhall not be above forty years. No alienation ſhall be of ſuch houſes, unleſs that preſently upon ſuch alienation there be an abſolute purchaſe in fee ſimple of other lands of as great value.

— 18 El. c. 11. All leaſes made by ſuch perſons (as 13 Eliz. c. 10. before) where another leaſe for years is in being, not to be expired, ſurrendred or ended, within three years next after the making of ſuch new leaſe ſhall be void. All bonds and

and covenants for renewing or making of any leaſe, contrary hereunto, or to 13 El. C. 10. before, ſhall be void.

1 El. not printed the like (as 13 El. C. 10. before) for Archbiſhops and Biſhops, unleſs it be of eſtates made to the King, his heirs and Succeſſors.

32 H. 8. c. 28. No fine, feoffment, or other act by the husband only, of any land being the inheritance or freehold of the wife, ſhall be a diſcontinuance or prejudicial to the wife, or ſuch as have intereſt after her death: leaſes within the compaſs of this Statute only except.

Warranty of an eſtate of inheritance or for life, deſcending upon him that ought to have ſuch eſtate, maketh a diſcontinuance. As if tenant in tail of an advowſon in groſs, ſuffer an uſurpation by 6 months, the releaſe of a collateral anceſtor with a warranty is a diſcontinuance, for he hath fee by the uſurpation.

So it ſeemeth of a collateral anceſtors releaſe, with warranty to the Grantee in fee of a rent or advowſon in groſs by Tenant in tail. But if tenant in tail of a rent or advowſon in groſs grant it in fee with warranty, this is no diſcontinuance, but at the pleaſure of the iſſue.

Diſcontinuance taketh away the entry of thoſe that come to have title after his death. If he (whoſe entry is barred by a deſcent or diſcon-

continuance) have the Freehold cast upon him by a new title, he shall be in of his ancient title: which is termed a remitter.

Lit. 152. As if the heir of the disseisor (in by descent) make a lease for life to I.S. the remainder for life or in fee to the disseisee,

11 *E.* 4. 1. if tenant in tail discontinue, and then disseise the discontinue, and die seised, whereby the lands descend to his issue; if

21 *E.* 3. 26. the husband make a feoffment in fee of land in the right of his wife, and take back an estate in fee to him and his wife. In these cases the disseisee after the death of I. S. the issue in tail, and the wife surviving, her husband is remitted: but if the husband survive, her heir is not; for there is another tenant of the Freehold, against whom he may bring his action. And in the case of tenant in tail before, though the heir of the discontinue were within age at the time of the descent to the issue in tail, yet his entry is gone for ever, by reason the Issue is remitted.

CHAP.

CHAP. V.

Of Intruſion, Abatement, Diſſeiſin and uſurpation.

OUſter is, when the Freeholder is ouſted, or put out. And therefore it gaineth a Freehold unto the party.

This ouſter is of a Freeholder in Deed or in Law. Of the firſt ſort are Intruſion or Abatement.

Intruſion, which is after the death of Tenant for life, be it a mans own life or auother mans, Tenant in Dower, or by courteſie, &c. *Old Nat. Br. 135.*

Abatement, which is after the death of one that hath the inheritance, whether the land diſcend unto his heir, or he die without heir. *5. H. 7. 6.*

Of the ſecond ſort are diſſeiſin and uſurpation.

Diſſeiſin is the ouſting of him that hath a Freehold in Deed: which of a rent or other profit is by the diſturbing of him in the means of coming to it. As in every rent, whether Rent-ſervice Rent-charge, or Rent-ſeck, Encloſer and Foreſtaller. *Lit. 62.*

Encloſer is, when the Tenant encloſeth the Land ſo as he cannot come to diſtrein, or to demand it, But if it be *Lit. 52.*

a Park or such like, that hath of ancient time been enclosed, so as it is not done of purpose to keep him from his rent, that is no disseisin.

99 E. 3. 15

Forestaller is, when the Tenant besetteth the way with force and Armes upon his coming. Of which nature also is the menacing of him that for doubt of some bodily hurt, death or loss of member he dare not come.

In a Rent-service and rent-charge, Rescous and Replevin.

Rescous, when either the party having distrained, the distress is rescued, or being upon the land to distrain, cannot be suffered.

Replevin is, when an action of replevin is brought upon a distress taken.

In a Rent-charge and a rent-seck denier.

Denier is, when the Rent (being demanded upon the land) is not paid.

Usurpation is, when the Church becometh full by the presentment of a wrong Patron: which is done by the institution of the party presented.

Prerogative.

But against the King Induction only doth it. Therefore at the Common

mon Law, in a *Quare impedit*, Plenarty day of the Writ purchaſed, is a good plea, though it be by inſtitution only. And the Plenarty by ſix Months (which barreth the right Patron of his *quare impedit*, by the Statute *Weſtm.* 2. *c.* 5.) is accounted from that time between common perſons. So is it for the King when he preſenteth. And in theſe caſes the Ordinary may certifie a plenarty without making mention of any induction, but of admiſſion, and inſtitution only. But againſt the King plenarty is accounted from the time of induction, and not before. And if a Patron that holdeth of the King, preſent, and die after admiſſion and inſtitution of his Clark, and before induction; the King ſhall preſent a new. Otherwiſe it is in the caſe of a common perſon. But plenarty is no plea in a *quare impedit*, againſt a perſon imperſonee (that is, a ſpiritual body politick, which being Patron, hath the Church appropriated in ſucceſſion (*viz.*) to hold to their proper uſe, without preſentation, inſtitution, or induction of any Incumbent) for his plea muſt be, That the Church is full of his preſentment, which a perſon imperſonee cannot ſay.

Statutes.

Weſtm. 2. *c.* 5. Uſurpation upon Gardeins, tenants in Dower, or upon femes covert, or houſes of religion in time of vacation, ſhall not put the heirs femes, or houſes of Religion out of poſſeſſion. But

faint recoveries shall not be avoided in such cases by way of Plea.

Plenarty is no plea in a *quare impedit* or darrein presentment, if the Writ be purchased within vi. moneths.

When one parcener presents in anothers turn, yet this gaineth no possession: for the other may present when her turn cometh again.

CHAP. VI.

Of Trespasses in Goods.

Such is the nature of an Offence without force.

An offence with force is a trespass, or offence against the Crown. For in all Inditements and Inquisitions, of treason, murder, felony, trespass, &c. *vi & armis* must be in, else it is not good.

Stat. 37. *H.* 8. c. 8. *reciteth the Common Law to be so.*

Trespass is a criminal offence punishable by a fine unto the King. So is every contempt punishable: and for this reason no action of Trespass lieth for the Lesse for years, against the Lessor, (though he distrein without cause) for that the Statute of Marlebridge, c. 4. is, That he shall not be punished by fine and ransom; which, if he be attained in this action, he must needs be, and for this the party must be imprisoned till he do compound. Therefore after tender of his fine, the King cannot justly detain him in prison.

Trespasses

Treſpaſſes touch poſſeſſions or the perſon. Poſſeſſions, when the wrong is done in them, namely in goods or land.

Treſpaſs in goods is the wrongful taking of them with pretence of title. And therefore altereth the property of thoſe goods. So as one cannot declare in an Action of treſpaſs, that the defendant took his horſe at S. and carried him to D. and there killed him againſt the peace, &c. For by wrongful taking, the property being diveſted out of the plaintiff, and veſted in the defendant, conſequently it followeth, that he cannot kill his own horſe againſt the peace.

CHAP. VII.

Of Treſpaſs in Land.

TReſpaſs in land is, when the treſpaſs is done upon an actual poſſeſſion thereof. For of a treſpaſs done (a) after the death of the Anceſtor, and before the heirs entry, after (b) breach of the Condition, and before entry for it: where a leaſe for years is made, reſerving a rent, upon condition to be voyd if the rent be not payd: or after Michaelmas, & before the Leſſees entry, where a leaſe for years is made to begin at that day: no action lieth for the heir in the firſt caſe, for the leſſor in the ſecond, nor for the leſſee in the third; becauſe they were not

(a) 12. *H.*7 22.
(b) 1 *Mar. Pl.* 142.
Park. 4.

ſed of the Land at the time of the treſpaſs done; yet the leſſor in the ſecond caſe might have made a new leaſe before his entry; for the firſt Leaſe was meerly void. and the Leſſee in the laſt caſe might before Michaelmas grant away his term.

21 *H.*7.39. **Where beaſts or any other chattels,** ſhocks of Corn, or whatſoever elſe, whether Coniſance may be of them to bring a replevin, or not: **that ſo the treſpaſs may be diſtrained by him that hath dammage by it.** As one that hath Common out of land, though he have nothing in the land it ſelf, ſo as he can have no action of treſpaſs againſt the owner of the beaſts, for their entry into the land, nor the graſs waſted, &c. yet he may diſtrain them dammage feaſant, becauſe of the dammage he ſuſtaineth. But ſo cannot *Ceſti qui uſe*: for he hath nothing at all to do in the land, ſave that there is a confidence between the feoffees and him: but the feoffees may puniſh him by the Common Law, if he occupy the land, for he is but a meer ſtranger. And if a ſtranger of his own head drive out beaſts that are dammage feaſant, the owner of the beaſts ſhall puniſh him, for he is endammaged by this driving out, and the other hath no loſs.

15 *H.*7.13.

*F.N.B.*220. *f.* 3. *H.*6.1. **Hither belongeth ejectment, when a termer for years of land is ouſted:** Whether by the Leſſee or a ſtranger, but not a Termer for years of beaſts or other Chattels.

Prerogative.

Here (*viz.*) of land, which is a thing permanent: for things transitory and removeable the King may be put out of his poſſeſſion, & have his action according, as raviſhment of gard, *quare impedit*, &c. But of things permanent he cannot have an Action, as a *Præcipe quod reddat*, ejectment of ward, &c. becauſe of ſuch things he cannot be put out of poſſeſſion: the King having poſſeſſion by matter of Record, or other good title, none can put him out. But if having no title by matter of Record, or otherwiſe, he enter upon me, and put me out, there if I enter again, my entry is lawful, and no intruſion. So if the King ſeiſe upon an office, finding that his tenant died ſeiſed but of an eſtate for life, the reverſion to another; he in the reverſion may enter, and make a feoffment: for the King ſeiſeth by colour of a Record, which record giveth him no title indeed.

1 *H.*7.19.

Stamf. prer. 74.

8 *H.*4.16 *per Stamf. pr.*57.

CHAP. VIII.

Of Menaces.

TReſpaſſes to the perſon are with pretence of violence, or violence indeed, Pretence of violence, as Menaces and Aſſaults.

Menaces are threatning words of

(a) 18 E. 4. 28
(b) 7. E. 4. 24.

of beating one, or such like, through fear whereof ones business is foreslowed. For a menace only (without other loss) maketh not the trespass, but both of them together.

CHAP. IX.

Of Assault.

(c) 40 E. 3. 40
(d) 22. Ass. pl. 40

An assault is an unlawful setting upon ones person. As offering to beat one though he do not beat one indeed, striking (d) at one with an Hatchet, or such like, though he do not touch him. Whither belongeth lying in wait, besetting his mansion house, and not suffering his servants to go in and out, &c.

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CHAP. X.

Of false Imprisonment.

Violence in deed, is false imprisonment or bodily hurt.

False imprisonment is an unlawful restraint of liberty. As (a) arresting one against his will, though it be in the High-street, and he never put in prison in any house; detaining of a woman (b) against her will, whom he hath ravished. so if a (c) master imprison one without cause, and deliver the key of the door to

(a) 22 Ass. pl 85.
(b) 43 E. 3. 20
(c) 22 E. 4. 45.

to a ſervant that hath notice of his wrongful impriſonment of him, if the ſervant deliver him not, he ſhall be puniſhed in an action of falſe impriſonment. But if the impriſonment be upon a falſe and feigned ſuit, as in ſuing (*d*) execution upon a Statute merchant, when the money is paid; yet no action of falſe impriſonment lieth, for he is impriſoned by courſe of Law.

d) 43 *E*3.3

CHAP. XI.

Of Battery.

BOdily hurts are either outward violences only, or Rape.

Outward violences only, are Battery and Maim.

Battery is the wrongful beating of one. But if a man will take away my goods, I may lay my hands upon him, and diſturb him, and (if he will not leave) I may beat him, rather than he ſhall carry them away; for that is no wrongful bearing.

9 *E.* 4. 28.

CHAP.

CHAP. XII.

Of Maim.

MAim is the wrongful spoyling of a member defensive in fight. As cutting off ones finger, knocking (*b*) out ones fore-tooth (*c*), putting out his eye, &c. Otherwise it is of knocking out his grinding teeth, cutting off ones ear, nose, &c. for these are but deformities.

(*a*) 18 *E.* 3. 94.
(*b*) 8 *H.* 4. 31. *Cor.* 458.
(*c*) *Brit. & Bra. p. Stamf.* 38. *b.*

CHAP. XIII.

Of Rape.

THese are outward violences only: Rape is the carnal abusing of a (*d*) woman against her will. But if the woman conceive upon any carnal abusing of her, that is no rape, for she cannot conceive unless she consent.

(*d*) 9 *E.* 4. 6. *Br. per Sl.* 24.

Statutes.

6 *R.* 2. *c.* 6. If the woman after rape consent, as well she as the ravisher be disabled to have any heritage, dower, or Joynt feoffment after the death of their husbands and Ancestors, and the next of blood shall have

have liſe to enter incontinently.

CHAP. XIV.

Of Contempts.

CErtain offences againſt the King are in the nature of treſpaſſes, and are termed contempts: as (a) making reſcous upon his Writ ſerved (b), going armed in his Palace, &c. where ſometime the puniſhment is increaſed according to the quality of the offence, not only in the fine, but further, in the loſs of member, and ſuch like. As a Juror appearing, and being challenged, if he do not appear upon demand, when he is found indifferent, ſhall be fined by the value of his land by a year. He that ſmiteth a man (d) in Weſtminſter Hall, or a Juror in the preſence of the Juſtices, ſhall have his right hand cut off, his land and chattels forfeited, and in the latter caſe be committed to perpetual priſon.

(a) 38 *H.* 3. 9.
(b) 24 *E.* 3. 3.
36 *H.* 6. 27.
(d) 41 *E.* 3. *Cor.* 280.
(e) 19. *E.* 3. *Judgment* 174.

CHAP.

CHAP. XV.

Of Offences againſt the Crown.

THus much then of Treſpaſs: It remaineth to ſpeak of Offences againſt the Crown, which are criminal Offences puniſhable by death.

Where further alſo all the offenders both hereditaments, as lands, rents, &c. whether for life (a) only or of (b) an eſtate of inheritance, and chattels not only in poſſeſſion, (c) but ſuch as he hath but a right to, as land, (d) whereof he is diſſeiſed, debts, (e) goods (f) to be accounted for, or wrongfully (g) taken; But (h) not ſuch as he is to recover, but damages for, as in battery, &c. are forfeit to the King. And that as well in Felony, as Treaſon, ſave only in Felony Land of inheritance is forfeit to the Lord, as appeareth (i) afterwards.

Hereditaments (k) from the time of the offence (whether the attainder be by Outlawry, verdict, or how ſoever elſe) Chattels though real, (l) as a leaſe for years, &c. from (m) the time of the attainder only. So (n) as a ſale or gift before, is good, for he muſt live of them. And therefore after enditement, and before attainder, the goods ſhall not be removed out of his houſe, but ſhall be in the keeping

(a) *Stamf.* 116. *b. & 190.*
(b) 26 *aſſ. pl.* 4 *in high treaſon.*
(c) 22 *aſſ. pl.* 63
(d) 6 *H.* 7. 9.
(e) 29 *aſſ. ibid.*
(f) 10 *aſſ. pl.* 5.
(g) 29 *aſſ. pl. ibid.*
(h) 29. *aſſ. ibid.*
(i) *chap.* 16.
(k) 30. *H.* 6. 5.
(l) 2 *Mar.*
(m) 8 *E.* 4. 4.
(n) 8. *E.* 4. *ib.* 7 *H.* 4. 47. *Br. forg. de ter.* 10.

keeping of his neighbours. And in theſe and all other forfeitures, as upon an (o) enditement of *fugam fecit*, or (p) if one be taken with the manner upon a robbery, or (q) tarry the exigent, &c. The Town is chargeable with the goods, and therefore (r) may ſeiſe them whereſoever they be.

(o) 5 *H.4. ſorf.* 32.
(p) 3 *E.3. cor.* 377
(q) 22 *aſſ. pl.* 8.
(r) 22 *aſſ. ibid.*

Statutes.

31 E.3.c.3. No man nor town ſhall be charged in the Exchequer, by the extract of the Juſtices, of the Chattels of fugitives, or felons, if they can ſhew that another is chargeable.

1 R.3. c.3. No Sheriff, Under-Sheriff, or Eſcheator, Bayliff of Franchiſes, nor any other perſon take or ſeiſe the goods of any perſon arreſted or impriſoned, before that ſuch perſons ſo arreſted and impriſoned be convict, or attainted of ſuch felony, according to the Law of England: or elſe the ſame goods otherwiſe lawfully forfeit, upon pain to forfeit the double value of the goods ſo taken, to him or them that ſhall be thereby indammaged, by action of debt in this behalf to be purſued.

The blood alſo is here corrupted. So as a remainder to his right heir can never take effect. The eldeſt ſon attainted of felony in his fathers life time, and him ſurviving, or his iſſue (a) (if he die before) cannot inherit: and beſides, ſhall be an impediment, that the younger brother

37 *H.8. Br. dit.* 42.
22. *H.* 6. 38:
(a) 32 *H.8. Dy.* 48.

(b) 22 H.6.ib. (c) 31 H.8.Dy. ibid. (d) Lit.169 (e) 3 & 4 Ph.

ther cannot, but it ſhall go to the Lord by eſcheat. Otherwiſe (c) it is, if the eldeſt ſon die without iſſue in his fathers life time.

Laſtly, the wife loſeth (d) her dower, and notwithſtanding (e) the husband alien the ſame before the offence committed.

Statutes.

1 E. 6.c.12. No dower ſhall be forfeit, by the husbands attainder, of any murder or felony whatſoever.

Prerogative.

3 El.3.cor.209. 3 E.3.cor.289. 5 R.4.f.32. (f) 2 E.3. cor. 377. 14 E.2.T.19. El. Dy. 355. (g) 8 E.3. cor. 427. (h) 26 Aſſ.pl. 47. (i) Sta. f 35. b. (k) 9 H.4.i. (l) Stanf 22.s.

Thoſe that flie for fear of the offence (we call it a *Fugam fecit*) forfeit their Chattels. Acceſſaries after the Fact, that is to ſay, witting maintainers (and (f) if it be of one outlawed in the ſame County; though they have no other notice of it) as by (g) receiving one that flyeth for it into his houſe, and ſhutting the door, ſo as the Countrey thinking him to be there, he eſcape whilſt no man followeth him; ayding him with money, but not with good words, as wholſom adviſe, ſpeaking or writing for his delivery And therefore alſo that ſuffer (i) one arreſted whether by themſelves or any other to eſcape, which we call a voluntary eſcape, are guilty of the ſame offence.

Pri-

Prerogative.

Concealing the Offence, without discovering it unto the King, or his Councel, or to some Magistrate, is called misprision; and that forfeiteth (a) **Chattels, and hereditaments during their life.**

CHAP. XVI.

Of Felony.

Offences against the Crown be of two sorts, Felony, and High-treason. Felony is an offence of the Crown, not bent immediately against the State, where the forfeiture of the offenders (b) inheritance is given to the Lord. (whether it be in petty (c) treason, or other Felony, and (d) at any time after he is attainted; And therefore the Lord may have a Writ of Escheat before Execution. But (e) of lands (whereof one is seised in the right of his wife) the King shall have the issues during the husbands life.

(b) 27. E. 3. Escheat 17.
(c) 22. ass. pl. 49
(d) Sta. 198. a.
(e) Sta. 190. c.

Prerogative.

The King, both (f) here, and wheresoever (g) the offender was dispunishable of waste (as if he were seised of land in the right of his wife) **is utterly to waste the inheritance,** by rooting up the

(f) Sta. 190. a.
(g) Sta 190. c.

houſes and trees, plowing up the meadows, digging up the land, &c. And this is in deteſtation of the offence.

Statutes.

— **Magn. Ch. C.** 22. The King ſhall have the land by a year and a day, and then render it to the Lord of the fee.

— **Prerogative,** c. 15. giveth the King the profits by a year and a day, and moreover the waſting of it.

CHAP. XVII.

Of Stealth.

FElony is a bare Felony, or petty treaſon.

Stamf. 182. **Bare Felony** is a Felony of the loweſt nature, and is puniſhable by hanging.

This is ſimple or mixt.

Simple, as ſtealth and manſlaughter.

Stealth is the wrongful taking of goods
4 *H.* 7. 5. without pretence of title. And therefore altereth not the property, as a treſpaſs doth, ſo as upon an appeal the party ſhall re-have them.

Statutes.

Statutes.

21. H. 8. c. 7. (made perpetual. 5 El. c 18) — The ſervant that hath any goods or chattels delivered him to keep by his maſter, and (with an intent to ſteal) doth either, go away therewith, or being in ſervice imbezle, or convert the ſame to his own uſe, ſhall be judged a thief, if the value of the goods amount to xl. s.

This extendeth not to apprentices, or any perſon within eight years of age.

Inne-keepers muſt anſwer for goods of their gueſts ſtollen: though they let them have a chamber with a key unto it, to keep their goods in. But if the gueſt ſuffer with his good will a ſtanger (whom he knoweth not) to lodge with him in the chamber, and the ſtranger rob him, the Inn-keeper ſhall not be charged. Otherwiſe it is, if he be lodged there by the Inn-keeper. — 22. *H.* 6. 21.

Prerogative.

Goods confiſked, that is to ſay, which the thief attainted for ſtealing another thing, for if it be for ſtealing the ſame goods they are ſaid to be forfeit and not confiſked. **diſclaimeth to have any property, in and Waiſes** that is to ſay, **which a thief** (but not one that committeth a treſpaſs) **waiveth are the Kings, if he** (whether any officer of his, or the Lord of the Franchiſe, (a) 3. *E.* 3. *Cor.* 371. (b) 3. *E.* 3. *Cor.* 355. (c) 12. *E.* 4. 5. (d) 21. *E.* 4. 16.

seise them before the partie from whom they were stolen. But if the party from whom they were stolen seise them first (though it be not in xx. years after they be stolen) or doing his diligence to apprehend the thief, which is called fresh suit, whether the thief be taken at his suit or not, convict him afterwards, upon an appeal; he shall have his goods again.

21. E. 4. *ibid.* 7. H. 4. 43.

Statutes.

21 H. 8. C. 11. The party shall have restitution of his goods without fresh suit, if he or any for him give in evidence, by reason whereof the other is attainted.

27. H. 8. 22. The stealing of goods which exceed not the value of xiid (called petty Larceny) is a felony (for a man may justifie the calling of one thief for such an offence) that doth only forfeit his Chattels.

CHAP. XVIII.

Of Man-slaughter.

Man-slaughter is the killing of any person (a) born into the world, though he be not baptized. But (b) to kill an infant in *venter sa mere*, is no felony.

(a) *Stamf.* 21. c. (b) *Stamf. ibid.* 3 *ass. pl.* 2.

Statutes

Statutes.

21. E. 1. Stat. de malefact. in parcis: It is no Felony for Foresters to kill misdoers, if they will not submit themselves.

But if one live a year after an act committed which was the cause of his death, as beating, (c) poyſon (d) given him, &c. It is no felony in him that did the Act: but this death ſhall be accounted a natural death.

The killing of one by (e) chance (which we call by miſfortune, or miſadventure) in the doing a lawful act. But not if *A.B.* be fighting, and *C.* coming between to part them, be ſlain by either of them both without any ill intent, for that is felony at the leaſt, if not murder in him that killeth *C.* becauſe the thing which they were doing was unlawful: or in his own defence, which we call *ſe defendendo*, flying as far as he may to ſave his life; for otherwiſe it is felony, although the other purſue him: doth only forfeit his Chattels, and he muſt have a charter of pardon.

(c) 3. E. 3. coron 303.
(d) Stam. 21. d.
(e) 2. H. 4. 18.
(f) Stamf. 16. c.
(g) 4. H. 7. 2.
(h) 43. aſſ. pl. 3.

Statutes.

Gloceſt. c. 9. He that killeth a man by miſadventure or *ſe defendendo*, muſt put himſelf upon the Countrey, and if he be found to have done it ſo, the King, if he pleaſe, may pardon him.

Mat. C. 25. To kill a man by misadventure shall be no murder,

(e) 26. ass. pl. 32
(f) 26. ass. pl. 23

But the killing of one that attempteth to rob him whether (e) upon the high-way or if (f) when men come to his house, and compass it about to burn it (though they do not burn it) whereupon he issueth out and killeth one of them, is neither felony nor causeth any forfeiture at all.

Prerogative.

(a) 8. E. 2. Cor. 389.

Any unreasonable thing killing a man. As the wheel of a mill, when one falleth from the bridge into the water, and is caried by the violence of it under the outward wheel; the task of Corn that a man falleth from, and so receive his death: it, and every thing moving with it, is forfeit to the King.

(b) 3. E. 3. Cor. 140.

(c) 8. E. 2. Cor. 397.

As if a man being upon a Cart carrying Faggots, and binding them together, fall down by the moving of one of the Horses in the Cart, and die of it: both that and all the other horses in the Cart and the Cart it self, are forfeit. And these are called Deodands.

CHAP.

CHAP. XIX.

Of Chance-Medly.

Manſlaughter is Chance-Medly or murder.

Chance-Medly is manſlaughter without former malice. As if certain ſet upon one to kill him, and I. S. having no malice againſt him, being in the company, and ſeeing them combating, take part ſuddenly, and together with the reſt ſmite him that he die, this is chance medly in I. S. 1 *Mal. Pl.* 242.

CHAP. XX.

Of Murder.

Murder is manſlaughter upon former malice, which we call prepenſed malice. As if one to kill his wife, give her (lying ſick) poyſon in a roſted apple: & ſhe eating a little of it, give the reſt to a little child of theirs, which the husband leſt he ſhould be ſuſpected, ſuffereth the child to eat, who dieth of the ſame poyſon; this is murder though the wife recover: for the poiſon miniſtred upon malice prepenſed, to one (which by a contingency 18 *El. Pl.* 474.

procureth the death of another, whom he meant not to kill, nor bare any malice to) ſhall be as great an offence, as if it had taken the effect which he meant, proceeding from a naughty and malicious intent.

3. *El. Pl.* 258 Felony *de ſe*, that is, **he that murdreth himſelf, doth only forfeit his Chattels,** but not his lands; neither doth it work corruption of bloud, nor loſeth the wives dower, becauſe it is no attainder indeed. But his Chattels he doth forfeit, real and perſonal goods, debts, &c. And this forfeit ſhall have relation to the time of the act in his life, which was the cauſe of his death. So as husband and wife being poſſeſſed joyntly of a term for years of land, and the husband drowning himſelf, the term is forfeit to the King, and the wife ſurviving ſhall not have it: for the Kings title is from the caſting of himſelf into the water, which was before the wife had any title by ſurvivor.

And this forfeiture is as ſtrong to give away the term as an expreſs grant, which the husband might have done and barred his wife.

CHAP.

CAAP. XXI.

Of Robbery.

MIxt, is that kind of bare Felony which riseth from the former.

wherof there be two sorts, Robbery and Burglary.

Robbery is stealth from ones person by assault in the high way. But if either nothing (a) be taken, though he command him to deliver his purse or money, or money taken, but (b) without putting the person in fear by assault and violence (as where one is indited, *Quod vi & armis apud B. in via regia ibidem xl. s. de pecuniis numeratis, &c. felonice cepit de persona I. S.*) it is no Robbery. And therefore in this latter case he may have his Clergy at this day.

(a) 9. E. 4. 26.

(b) 5. E. D. 224

CHAP. XXII.

Of Burglary.

BUrglary is the night-breaking of an house, with an (a) intent to steal or kill; though none be killed, nor any thing stolen. And so it is of a (b) stable, parcel of a house, but (c) not of breaking ones close to kill him, nor ones house, if it be but to beat him, nor though it be to kill him, if it be in the day time. (d)

(a) 1. E. 6. Br. Corone. 179.

(b) 1. E. 6. ibid.

(c) 13. H. 4. 7.

(d) Stamf. 30. b.

CHAP.

CHAP. XXIII.

Of petty Treaſon, properly ſo called.

AND of bare Felony ſo much ſhall ſuffice. Petty treaſon is a Felony: (e) For where one is arraigned for falſifying the Kings Seal (which is a petty Treaſon) a charter of pardon of all Felonies is a good plea, of higher nature than bare Felony is; the puniſhment whereof burning.

(e) 1 E. 3. 24.

(f) 1. R. 2. 4. F. N. B. 269. b. (a) 22. aſſ. pl. 49 21. E. 3. 17. Cor. 477.

This is againſt mortal creatures, or againſt God.

(b) 12. aſſ. pl. 30 19 H. 6. 14 his maſters wife (c) 1 R. 2. 4. (d) 12 aſſ. pl 30 1 R. 3. 4. (e) 21. E. 3. ib. 19. H. 6. ib.

Againſt mortal creatures: as Petty treaſon (properly ſo called) and Sodomitrie. Petty treaſon (properly ſo called) is the killing of any to whome private obedience is due: as ones maſter, miſtreſs husband, &c. for which inſtead of burning, (which the woman here ſhall be) a man ſhall be hanged and drawn.

CHAP.

CHAP. XXIV.

Of Sodomitry.

SOdomitry is a carnal copulation against nature, to wit, of man or woman in the same sex, or of either of them with beasts.

F.N.B.269. b. they shall be burnt, and that by the Common Law.

CHAP. XXV.

Of Heresie.

AGainst God, is that which is immediately is. bent against his Majesty as Heresie, and Sorcery. Heresie is a presumptuous oppugning of an Article of Faith: whereof what it is, the Common Law taketh no notice, But in case of Heresie, the party before he can be burnt, must be convict in a Provincial Synod; and after abjuration, make a relapse into the same or some other Heresie.

(f) *Lib. Frow. No Sanctuary lieth in case of heresie, for it is treason against God.*

(g) *F.N.B.269 b. Sorcerers and Sorceresses, & Heretick, shall be burnt, and that by the common Law. F.N.B.269.b.*

CHAP. XXVI.

Of Sorcery.

F.N.B.269.b. 45.E.3.17.

SOrcery is a consulting with Divels, and containeth under it, Conjuring Necromancie, and such like.

CHAP. XXVII.

Of Petty Treason growing by Prerogative.

(a)26.Ass.pl.63 (b)3.H.7.10 (c)1.E.3.24.

HEre divers offences are accounted Felony, in respect of the Kings Prerogative; as to counterfeit the Kings coyn, great Seal or privy Seal; to acknowledge any foreign person to have any power within the Realm. As (d) by pleading an excommunication under the Popes Bull; and are punishable as Petty Treason.

(d)30.Ass.pl.19

CAAP.

CHAP. XXVIII.

Of High Treaſon,

HIgh Treaſon followeth, which is an offence of the Crown, directly againſt the State. As in compaſſing the death of the King: For intending his death (without more) is Treaſon; otherwiſe it is in felony, except an Act be done. Or the Queen his wife, or of his Son and Heir, by levying war within the Realm, or adhering to his Enemies, or them comforting, aiding, &c. and is puniſhable by drawing hanging and quartering in a man, drawing and hanging in a woman,

(r) 25. E. 3. c. 2 *maketh a declaration of all theſe to be high Treaſon.*

(f) 13. H. 8. 12.

1. H. 7. 24. *Stamf.* 1. 82. c.

Statutes.

25. E. 3. de proditionibus cap. 2. It is made high treaſon to kill the Chancellor, Treaſurer, or Juſtice of either Bench, Juſtices of Eire, or of aſſizes, or any other Juſtices aſſigned to hear and determine in their place, doing their office.

To counterfeit the Kings money.

To bring falſe coyn into this Realm, counterfeit according to the money of England (knowing the ſame money to be falſe) to merchandiſe, or make payment with it.

To counterfeit the Kings great Seal, or Privy Seal. 1. Mar.

1. Mar. c. 6. Seal manual, Privy Signet, or Privy Seal.
Strange coyn current in this Realm.

1 & 2. Ph. & Ma. cap. 11. To bring wittingly false foreign coyn hither, to the intent to utter it within the Realm.

1. El. c. 11. To clip, wash, round or file, any money of this Realm, or current here: and causeth forfeiture of land for life only. But no dower shall be forfeited nor blood corrupted.

18. El. c. 1. To impair, Diminish, Falsifie, Scale, or Lighten any money by any art, ways or means whatsoever.

1. Eliz. c. 1. Advisedly, maliciously, and directly to affirm set forth, & defend the third time by expres deed or act, or to put in ure, or to execute any thing, for the defence or setting forth of the spiritual authority or jurisdiction of any foreigne person, heretofore claimed or used in any of the Queens Dominions.
So for any person compellable to take the Oath.
To refuse (after lawfull tender) the oath to acknowledge the Queen supream governor in all causes within her dominions

13. El. c. 1. To put in ure any Bull or instrument of absolution, or reconciliation from Rome, or to take upon one (by colour

colonr of any ſuch to abſolve or reconcile any perſon, or to publiſh any ſuch, Bull or inſtrument, To receive ſuch abſolution, or to procure, abett, or counſel any offendor to uphold him. The practice to abſolve, perſwade, or withdraw any perſon within the Queens dominions, from their natural obedience, or (for that intent) from the Religion now eſtabliſhed here, to the Romiſh Religion, or to move them to promiſe obedience to the ſea of Rome, or other Eſtate, or willingly to be abſolved, withdrawn, or to promiſe ſuch obedience.

1. Eliz. cap. 6. Maliciouſly, directly, and adviſedly, to ſay or hold opinion (the ſecond time) that the Queens Majeſty, or her heirs of her bodie, be not right Kings and Queens of this Realm, or that any other perſon ought to be.

their abettors, procurers, counſellors, ayders, &c. To affirm by any writing, printing deed, or act, the firſt time, their abettors, &c.

33. H. 8. c. 20. Attainder of high treaſon by the courſe of the common law, or ſtatutes of this Realm, ſhall be of as great force as an attainder by Parliament. And the King ſhall have the real poſſeſſion of every thing forfeited without inquiſition or office: ſaving to Strangers, &c.

29. Eliz. cap. 2. No attainder of high treaſon (for which the party is once executed

cuted) shall be impeached for any error, by the heirs, or any claiming under them.

26 H. 8. c. 13 & 5. & 6. E. 6. cap. 11. Any offence (made treason heretofore) done out of the limits of the Realm, shall be inquired here by Commission, and like proceſs used, as if it had been done within the realm.

One reſiant out of the limits of the realm, may be outlawed for high treaſon.

An eſtate tail ſhall be forfeit for High-treaſon.

The

THE FOURTH BOOK OF LAW.

CHAP. I.

Of Courts.

THus we have gone through both the parts of the Law, there remaineth yet one general and common affection ſcattered throughout the whole Law (as the blood is through the body) which we call an Action

Action is the handling of a cauſe in controverſie before certain Judges, who (in reſpect of the place where they are ſet to do Juſtice) are commonly called a Court.

Statutes.

36. Ed. 3. cap. 15. All Pleas which be pleaded in any of the King's Courts, before any of his Justices, or in his other places, or before any of his other Ministers, or in the Courts and places of any other Lords within the Realm, shall be pleaded, shewed and defended, answered, debated and judged in the *English* Tongue, and that they be entred and inrolled in Latin.

Of all apparent faults proceeding from the Action, As in false Latin (*a*) or default of form in the Writ, insufficiency in an office or Inditement, mis-awarding of Process, (as if of an exigent where no exigent lieth) impossibility in the Plea, as in account, supposing him to be his Receiver for seven years, and the Defendant pleads, fully accounted such a day, which is the first of those seven years; **The Court must take notice.** To abate the Writ, award a *Supersedeas* upon these offices, Inditements, or Process, to stay Judgment if the Defendants Plea be found against him, *&c.* though the party except not to it. And therefore although he that casteth an Essoyne cannot plead in abatement in the Writ, by way of Plea; yet if it be a matter apparent to the Court (as *Henricus, &c. Dux Hiberniæ*, where it should be

(*a*) 4 *H.* 6. 16. 5 *E.* 4. 7. 7 *H.* 6. 5. 4 *H.* 6. 16.

be *Dominus*) he and every other ſtranger, as *amicus curiæ*, may. And the Court is bound to abate it *ex officio*, though the Tenant or Defendant make default.

Every Court hath power to award forth Precepts. And if the Precept be not ſerved, another of the like nature ſhall go forth till it be ſerved. Therefore the ſecond Proceſs is called a Summons (or Attachment, as the firſt Proceſs was) the third a *Pluries*, the fourth, and all the reſt, *Plus pluries*. 14 *H.* 6 20. *In a Summons ad Warrantizandum* F. N. B. 75. *In a Reſicut alias*, *plevin.*

To every Court do belong both Clerks and Offices.

A Clerk is he that ſerveth for things to be done in Court, as entering the Pleas, and ſuch like.

Any error that appeareth to the Court to be the Clerks (miſpriſion) miſtaking, may be amended at any time. As a good original Writ or Precept ill entred in the Roll. A Writ againſt A. and B. and the whole Proceſs continued againſt B. and C. not A. and B. a *Scire facias* out of a fine and parcel of the Land omitted. 7 *H.* 6. 45. 44 *E.* 3. 18. 20 *E.* 47.

Statutes.

14 E. 3. cap. 6. No Proceſs ſhall be annulled or diſcontinued by the Clerks miſtaking in writing one ſyllable or one letter too little, or too much; but ſhall ſpeedily be amended, without any advantage to the other.

9 H. 5 cap. 4. made perpetual.

4 H. 6. cap. 3. The Justices before such pleas or Records be made, or shall be depending by adjournment, errors, or otherwise, may make such amendment as well after judgement as before.

4 H. 6. cap. 3. The former Statutes shall not extend to Records and Process, whereby any person shall be out-lawed.

8 H. 6. cap. 12. No Judgement or Record shall be reversed or annulled for error, assigned in rasing or interlining, adding, substracting, or diminishing of words, letters, titles, or parcel of Letters in any Record, Process, or warrant of Atturny, original Writ, or judicial Panel, or Return, though to the Judges of the Courts wherein the said Records and Process be certified (by Writ of Error, or otherwise) the same appear suspected. But the King Judges of the Courts where the said Records and Process be certified by Writ of Error, or otherwise, shall examine the same by themselves and their Clerks, and amend therein (in affirmance of the first Judgement) all that seemeth to them to be the Clerks misprision: Except Appeals, Indictments of Treason, and of Felonies, and the Out-lawries of the same. And the substance of the proper names, sir-

names,

names, and additions, left out in original Writs of Exigend, and other Writs containing Proclamation. And if any Record, Proceſs, Writ, Warrant of Atturney, Return, or Panel, to be certified defective, otherwiſe than according to the writing which thereof remaineth in the Treaſury, Courts, or places from whence they be certified; the parties in affirmance of the Judgements of ſuch Records or Proceſs, ſhall have advantage to alledge variance betwixt the ſame Writing and the certificate: which being found and certified, the ſame variance ſhall be by the ſaid Judges amended, according to the firſt writing.

27 Eliz cap. 7. After Demurrers joyned and entred, the ſame Court may amend all imperfections, defects, & wants of form, other than thoſe only which the party demurring ſhall particularly expreſs with his demurrer.

Officers are thoſe which are to ſerve the Courts Precepts, and where the precept ſo requireth, to certifie the Court thereof, which we call a return,

So upon a writ to inquire of damages, it is a good return that the inqueſt gave no damages. For he returneth what they did. 44. E. 3. 3

But upon a *capias* returned *cepi corpus*, he ſhall be amerced, if he have it not there as 44. E. 3. 2.

the day. For the Writ is, *Capias ita quod corpus ejus habere possis, &c. tali die, &c.*

Statutes.

Westmin 2. **Cap.** 39. Damages given against the Sheriff if he return not at all, or return a tardy, upon Writs delivered or offered to be delivered him by Billet. So upon returning *Mandavi Ballivo libertatis* falsely: upon resistance of any Great man to execute the King's Precept, the Sheriff shall take the *Posse Comitatus*, and see it served.

Stat. Eboz. 12. E. 2. **Ca.** 5. Bayliffs of Franchises must deliver their returns of the Writs to the Sheriff by Indenture, and if he change the Return, the Lord of the Liberty, and the party, shall recover double damages.

The Sheriff, *&c.* must set his proper name to all Returns.

27 **Eliz. c.** 12. Every Under Sheriff, Bailiff of Franchise, Deputy or Clerk of the Sheriff, *&c.* must take an Oath for the Supremacy, and for the true, speedy, and indifferent returning of Writs, and impanelling of Jurors, without taking above the Fees allowed.

29 **Eliz. cap** 4. Sheriffs may take for the serving of any Extent or Execution only

only 12 d. of, and for every 20 s. where the ſumm exceedeth not C. l. and 6 d. of and for every 20 s. being above an C. l. that they ſhall levy, or extend and deliver in execution, or take the body in execution for.

Courts are Courts of Record or Court Barons. For againſt a recovery pleaded in antient Demeſn, or other Court Baron, one ſhall not ſay, *nul tiel Record*, for it is no Record, but *nul tiel Recoverie*, and it ſhall be tried by the Countrey. Otherwiſe it is in the King's Courts. 9 E 4 42.

Of Records, which are the King's Courts, as he is King. Otherwiſe, if the King have a Court as Lord of a Manner, that is but a Court Baron. **And theſe have that credit, that no averment can be taken againſt any thing there entred or done.** And therefore work an Eſtoppel to the parties in like ſort, as Indentures did before. As upon a Leaſe made by fine, both parties are eſtopped to ſay the Leſſor had nothing in the Land. 9 E. 4. *ibid.* 15 E. *Fl.* 434 21 H. 9. 24. 5 E. 4 1.

So of Pleas in Bar, Replications, Returns of the Sheriff, &c.

Statutes.

1 E. 3. Cap. 4. Statut. 1. Averment given in a Writ of falſe Judgement againſt the Record certified.

Things also that cannot be granted but by Deed, pass here, and that more strongly, by matter of Record

18 *Eliz. ploy.* 483. 21 *H.* 7. 19. 39 *H.* 6. 26. *Stamf. præf.* 56.

The King taketh Hereditaments, though it be but for years. Otherwise it is of an Obligation of Chattel personal, **by matter of Record only**: for to personal and transitory things, as *Catalla felonum & fugitivorum*, wreck of Sea, treasure trove, and the profits of Land of persons out-lawed in a personal Action *&c.* the King is intituled without office or other matter of Record; but to take a

3 *El. ploy.* 289. Free-hold by a Condition broken, or purchase of his Villein, or such like, he cannot without office or matter of Record. Otherwise it is, where the Law casts a Free-hold upon him, as in a gift in Tail, the remainder to the King.

3 *El. ploy.* 229. 5 *E.* 4 7. And therefore also the King taketh a Free-hold without livery or seisin by deed inrolled: but cannot be infeoffed by Deed, without inrolment of Record, for that no Livery can be made unto him.

Lit. 39. **Villenage beginneth only by confessing a mans self to be one in a Court of Record.** And therefore in a *Præcipe quod reddat*, if the Tenant say, That he is a Villein to *I. S.* and holds the Land in Villenage, the demandant saith that is frank, *&c.* and he is found frank by the Jury: yet

41 *E.* 3. *Vill.* 5. he remaineth a Villein to *I. S.*

Duties

Duties of the Teſtator growing by record must be anſwered by Executors before other duties. 21 *E.* 4. 11.

Courts of Record are the Parliament, or Courts that have ordinary Juriſdiction. For the Parliament, when it is ſitting, may take a Recogniſance, and do ſuch other things as to a Court of Record appertaineth. 1 *H.* 7. 20. *the higher houſe.* *Br. Recogn.* 8. *the lower houſe*

The Parliament is a Court of the King, Nobility, and Commons aſſembled having an abſolute power in all cauſes. As to make Laws, to adjudge matters in Law, to try cauſes of life and death, to reverſe errors in the Kings Bench, eſpecially where any common miſchief is, that by the ordinary courſe of Law there is no means to remedy: this is the proper Court for it. And all their Decrees are as Judgments. And if the Parliament it ſelf do erre (as it may) it can no where be reverſed but in Parliament. 23 *El. Dyer.* 375. 1 *H.* 7. 19. 37. *a ſpl.* 17. 21 *E* 3. 46. *Br. Parliament* 16

Statutes.

4 E. 3. cap. 14. & 36. E. 3. cap. 10. A Parliament ſhall be holden once every year.

1. H. 4. cap. 14. No appeal ſhall be purſued in Parliament.

Prerogative

Prerogative.

Statutes of reſtraint bind not, unleſs they concern the Common-wealth, or be be ſpecially named: As the Statute of *Weſtmin.* 2. which altereth Fee-ſimple Conditional into an eſtate Tail, that Tenant in Tail ſhall have no power to alien, doth bind him: for it is for the Common-wealth. So as Lands being given to the King in Tail, the Remainder over, if the King have iſſue who alieneth, and dieth without iſſue, he in the Remainder may enter. But if by Statute one be attainted, and his Lands forfeit, with a proviſo that of ſuch Lands as he was ſeiſed to the uſe of any other *ceſty qui uſe* may enter; that bindeth not the King that *ceſty qui uſe* ſhould enter upon him, for it is not for the Common-wealth. But the Statute of 1 *H.* 5. *cap.* 5. that in Endictments, addition muſt be given to the party indicted, bindeth the King in that caſe, becauſe Endictments are eſpecially named.

He may licenſe things forbidden by the Statutes. As to coin money which is made Felony by the Statute, and was before lawful, for that is but *malum prohibitum.* But *malum in ſe*, as to levy a Nuſance in the High-way, he cannot licenſe to do: but when it is done he may pardon it. **But where the Statute ſaith his Licence ſhall be void, there it muſt have a clauſe of** *non obſtante*

obſtante, that is to ſay, this clauſe (notwithſtanding any Statute) elſe it is not good. As the Statute 23 *H.* 6. *c.* 18. is, That the Kings Grant to be Sheriff of any County, longer than a year, ſhall be void, notwithſtanding that the clauſe of *Non obſtante* be in the Patent; yet with a clauſe of *Non obſtante*, ſuch a Grant is good, and not without it. But neither without, nor by that clauſe he can diſpenſe with a Statute before it be made. And therefore a Licence to carry Bell-metal out of the Realm (notwithſtanding any Statute made or to be made) is not good, if a Statue be made after that to prohibit it. For he cannot diſpenſe with an Act of Parliament before it be made.

Courts of Record which have an ordinary Juriſdiction, are either general, whoſe Juriſdiction extends throughout the Realm, or but within ſome County: Wherefore theſe latter, for their order and courſe of proceeding, do in all things faſhion themſelves to the example of thoſe higer Courts, as of the Patents from whom they come. 34 *H.* 6. 41.

The former are thoſe that are holden in Term time only; the whole year having four Terms, Michaelmas, and Hilary Term, Eaſter and Trinity Term, and every Term ſeveral daies of Returns. If either the Return day, or firſt or laſt day of Term fall upon the Lords

Lords day, then the day following is taken instead of it.

Michaelmas Term (beginning the 23 of October, and ending the 28. of Nov.) hath 8 returns, *Octabis Michaelis*, that is the 8 day after the feast of Saint *Michael. Quindena Michael.* that is the 15 day after *Tres Michael.* that is at the end of 3 weeks after. *Mense Michael.* that is at the end of a moneth after. *Crastino animarum*, that is the nex day after *Crastino Martini, Octab. Martin. Quindena Martin.*

Hillary Term beginning the 23 day of January, and ending the 12 of February hath four returns, *Octabis Hillarii, Quindena Hillarii, Crastino purificationis, Octabis purif.*

Easter Term begirning 17 days after Easter, and ending the Monday next after Ascension-day, hath five returns, *Quindena paschæ, Tres paschæ, Mense paschæ, Quinq; paschæ*, that is five weeeks after *Crastino Ascensionis.*

Trinity Term beginneth 12 days after whitsunday, and continuing 19 days, hath five returns, *Octab. Trinitat. Quindena Trinitat. Crastino Johannis Baptistæ, Octab. Johannis Baptistæ, quindena Johannis Baptistæ.*

Statutes.

32. H. 8. cap. 21. Trinity Term shall begin the monday after Trinity Sunday, for keeping of Essoyns, profers, returns.

The

The full Term ſhall begin the Friday after *Corpus Chriſti* day, and have four returns onely, *Craſtino Trinitatis*, *Octabis Trini at*', *quindena Trinitatis*, *Tres Trinitatis*. The reſt are cut off.

To theſe Courts belongeth the power of ſending forth writs.

A writ is a Latin Letter of the Kings from thence in Parchment ſealed with his Seal.

All writs have a ſalutation, *Rex* to ſuch a one *ſalutem*, And a concluſion expreſſing the name of one which is witneſs to the Writ, called *teſte* (who in writs out of the Chancery is the King himſelf: in other writs the chief Juſtice of the place) the place, as *apud Weſtmonaſterium*, *&c.* and the time, both day and year of the making of it, if it be returnable, the day of the return is alſo appointed in it.

The third writ (which is the *Pluries*) not ſerved, is a contempt, whereupon an Attachment lieth. And therefore the third writ hath always this clauſe in it, *Vel ea cauſam nobis ſignificet.* So may the ſecond which is the *Alias* alſo have, if the Plantiff will.

2 *E.* 4. 1. *Fitz. Nat. Br.* 68. *Fitz. Nat. br. ibid.* 2 *H.* 6. 7. 7 *E.* 4. 14.

The Officer of theſe higher Courts is the Sheriff to whom is committed the cuſtody of the County.

For matters ſpiritual, as certyfying excommengement, and ſuch like, the ordinary is their Officer.

And

And to the Sheriff the Writ must be directed, though it be for a thing done in a franchise, and he shall send to a Bailiff of the franchise: who shall serve it as a servant to the Sheriff, and the Sheriff return it.

2 *H.* 6. *ibid.* And though the Sheriff serve an execution in a Franchise, yet it is good. And the Lord of the Franchise is driven to his action upon the case against the Sheriff, for the Sheriff is immediate Officer.

2 *H.* 6. *ibid.* But in a place excepted out of every County (as the Palace of *Westminster* is) it shall be directed to the Guardian of the Palace, for he is immediate Officer to the Court, and is in the nature of a Sheriff.

7 *E.* 4 14.
8 *H.* 6. 3.
12 *E.* 4. 15. So Certificates of excommengements, and such like must be made by the Ordinary, not by the Commissary, Arch-deacon, or any other, though he have an immediate Jurisdiction, unless he were specially admitted an Officer to the Court.

These general Courts are the Chancery and two Benches: the King's Bench, and Common place.

Chancery, which beside that it dealeth with matters of Conscience, and moderating the strictness of the Common Law by an absolute power, dealeth also in ordinary course of Law in divers cases especially, in suits concerning the King, as Petitions. *Scire facias*, to repeal his Patents, *&c.*

&c. and ſo it is a Court of Law and of Record, where the Judge is the Chancellor, having the cuſtody of the Great Seal of England, under which paſs all Writs out of the Chancery with *Teſte me ipſo*, and alſo the Kings Grants, being therefore called Letters Patents, Though it be of things which he hath in his natural capacity, as by deſcent from his mother, &c. and are entred of Record in this Court. 4 *El. Pl.* 213. *Br. Courts fol.* 108.

Statutes.

18 H. 6. cap. 1. The King's Letters Patents muſt bear date the day of the delivery of the Warrant to the Chancellor, and not before, otherwiſe they are void.

3 E. 6. cap. 4. Every one that hath any intereſt in any Land or office by, or under Authority of the King's Letters Patents (made after the fourth day of *February*, 27 H. 8.) may make his title, avowry Plea, &c. as well againſt the King as any other by an Exemplification (or conſtat) under the Great Seal.

13 Eliz. cap. 6. So of the Patentees of King *Henry*, 8 *E.* 6. Queen *Mary*, *Philip* and *Mary*, and her Majeſty that now is, all claiming under them.

Such Grants are effectual to paſs a freehold from the King without any live-

38 *H.* 8. *Br. Patents* 101.

ry

ry of Heiſlu. And therefore his letters patents being Tenant in Tail make no diſcontinuance. And being matters of record which being no livery, they take effect from the time of the date. Therefore the
37 H.6 21. Kings Charter of pardon ſhall be pleaded without ſhewing when is was delivered, becauſe being a matter of Record, it ſhall have relation to the date, and not to the livery. Otherwiſe it is of a deed.

In default of a Chancellor, the Lord-
Sta.5.El.ca. keeper of the great Seal hath his au-
18. thority.

The Keeper (or Maſter) of the Rolls is an aſſiſtant to this court.

In the Kings Bench and Common place, the Judges are one chief Juſtice, and three (or ſometimes more) other Juſtices. The *teſte* of their writ is, *teſte Johanne Popham* (the chief Juſtice &c.)

10 *Eliz.* 320 The Kings Bench is that which dealeth properly with Pleas of the Crown, both hearing and determining them.

10 *Eli. ibid.* The Common place which dealeth properly with common Pleas, ſuch are thoſe termed which concern poſſeſſions.

Prerogative.

10 *Eliz. ibid.* The King hath a proper Court of this kind, for all things touching his revenues, called the Exchequer.

The Judges whereof are called Barons or houſebands for the Kings Revenue;

quer being one chief Baron, & three other. And this also hath a court of chancery before the chancellor and barons of the Exchequer, called the Exchequer chamber.

The Escheator here is a special officer, and hath a kind of Court for finding out the Kings title to Lands, Tenements, or other things. 4 E.4.24. He may take inquisitions virtute officii.

Statutes.

14. E. 3. cap. 8 No Escheator shall tarry in his office above a year.

These are the Courts whose jurisdiction extends through out the Realm.

Those which deal but within some County, are the Sheriff in his turn, and the Coroners.

The Sheriffs turn is a court of record for offences, which are common grievances as robbery, (a) bloodshed, cliping, & washing of silver and gold, night-walking, the not repairing or making clean of a bridge or a ditch, (b) fraies, and assaults, &c. But not (c) murder, or breaking of ones hedge &c. for they are no common grievances, but a wrong to one singular person. F.N.B.82. (a) 22 E. 4.22. (b) 10 H. 6,7. (c) 22 E.4.ib.

Whereunto every man of the age of 12 years and upwards (being within the precinct) oweth suit, and must be sworn to the Kings Allegiance. And this is called a suit real, being not due by reason of mens Freeholds, but of their body, because they are resiant within the precinct of the Leet. But Women are not compellable to F.N.B.116. Br.per.Br.hist. 39. 12 H.7.18. 25 E.3.23. Br.per.Br.ib.

F. N. B. ibid.

come thither, nor to be ſworn to the King. And therefore when a woman is outlawed, ſhe is ſaid to be waved and not outlawed, becauſe ſhe is never ſworn to the Law.

St. Marl. c. 16. ſo reciteth it.

Peers of the Realm are excepted, and Parſons of Churches, and other men of Religion, as appeareth before.

2 H. 4. 24. 8 R. 2. avowry. 194.

The offendor here ſhall be amerced, and diſtrained for that amercement, throughout the whole precinct of the County.

Statutes.

Magn. Chart. 35. The Sheriff ſhall make his turn throughout the Hundred but twice a year; that is to ſay; once after Eaſter, and again after Michaelmas. And the view of Frankpledge ſhall be made at the turn of Michaelmas.

13 E. 3. 14. Stat. 1. The turn muſt be yearly, once within a month after Eaſter, and another time within a month after Michaelmas: if they hold them in another manner, they ſhall loſe their turn for the time.

1 E. 3. c. 17. Endictments in Sheriffs turns muſt be by Rolls indented; one part to remain with the Endentors, the other with the Sheriff.

1 E. 4. c. 2. Upon Endictments and Preſentments taken before Sheriffs, or their Miniſters at their turns or Law-days, they ſhall not attach, arreſt, or impriſon, nor levy any fine or amerciament of any perſon ſo indicted (or preſented) but ſhall deliver

deliver the ſame Endictments or Preſentments to the Juſtices of Peace of the ſame County at their next Seſſions, who ſhall proceed thereupon as if they were taken before them.

1 W. 3. c. 4. None ſhall be returned upon pannel of enquiry of the Sheriffs turn, but men of good name and fame, having within the ſame Freehold land to the yearly value of 20 s. or Copy-land to the yearly value of 26 s. 8 d. and every Endictment otherwiſe taken ſhall be void.

The Coroners Court is a Court for matters of the Crown. Battery, Maime, Rape, Murder, &c. *Stam.* 52.

Statutes.

Weſtm. 1. c. 10. Coroners ſhall be choſen in all Counties, of the wiſeſt and ſufficienteſt Knights.

14 E. 3. c. 7. That no Coroner ſhall be choſen, unleſs he have land in fee ſufficient in the ſame County, whereof he may anſwer to all manner of people.

28 E. 3. c. 6 All Coroners of the County ſhall be choſen in the full Counties, by the Commons of the ſame Counties, of the moſt convenient and moſt lawful people that ſhall be found in the ſame Countie to do the office. Saved always to the King, and other Lords which owe to make ſuch Coroners, their Seigniories and Franchiſes.

Weſtm. 1. c. 10. The Sheriffs ſhall have

Counterrols with the Coroners, as well of their Appeals, as of Inquest of Attachments, and of other things which to that office doth belong.

Westm. 1. cap. 10. Coroners must take nothing for doing their office.

14 *H.7.31.* 4 *H.7. 3.* **Upon just cause of exception to the Sheriff proces out of the higher Courts shall be directed to the Coroners.**

Prerogative.

Div of courts f. 102. **The Steward and Marshal of the Kings house, have a Court, for all personal actions, and pleas of the Crown arising there.** As debt, covenant, trespass, &c. and by the common Law they might hold plea of Freehold it self, as it seemeth by the Statute of *Artic. super Chartas cap.* 3. which saith, from henceforth they shall not hold plea of Freehold. Also they may inquire of treason, murder, felony, manslaughter, bloodshed, &c. and take appeals of all kinds of Felony and Maim.

Div of courts f. 102. *Stamf. 57.a.*

Statutes.

Artic. super chart cap. 3. They shall not hold plea of any contracts and covenants, but such as one of the Kings house maketh with another of the same house. Nor of any trespass 4 unless the party were attached and the plea determined before the kings departure from the place where the trespass was committed.

Any

Any thing attempted here againſt, is void.

Pleas of Felony (that cannot be determined before the Steward, becauſe the Felons cannot be attached, or for other like cauſe) ſhall be referred to the Common Law.

5 E. 3. c. 2. and 10 E. 3. c. 2. Inqueſts ſhall be taken there by men of the County about, and by no men of the King's houſe, except it be in Covenants, Contracts, and Treſpaſſes, when either party is of the King's houſe.

5 H. 6. c. 1. The Defendants may averr that themſelves or the Plaintiff (at the time of the Suit commenced) were not of the King's houſe againſt the Record.

13 R. 2. c. 3. The juriſdiction ſhall not paſs above 12 miles about the K. houſe.

33 H. 8. c. 12. The Lord Steward of the King's houſe alone, and (in his abſence) the Treaſurer & Comptroller of the K. houſe, with the Steward of the Marſhalſy, or 2 of them (whereof the Steward of the Marſhalſy to be one) may without Commiſſion hear and determine all Treaſons, Miſpriſions of Treaſons, Murders, Manſlaughters and Bloodſhed within the K. houſe, although the King be removed before. The enquiring and verdict muſt be by the K. houſhold ſervants in the Check Roll.

No Clergy nor Sanctuary to any that is found guilty before them.

By reaſon alſo of certain Franchiſes, grow two other Courts of Records,

which deal within ſome certain precinct; a Leet and Court of Pypowders.

Fitz.N.B. 82. 23 *E.*3.22. 22 *E.*4. 22.

A Leet is a Court of Record, having the ſame Juriſdiction within an Hundred only, of ſome leſs Precinct, which the Sheriffs turn hath in the County, the profit of it being to a common perſon.

(*a*) 22 *E.*4.22. (*b*) *F.N.B.*161 *Brit.g. Br.leet* 39. (*c*) 2 *H.*4. 24. 8 *R.*2. *Avowry* 194.

Therefore it (*a*) dealeth with offences that are common grievances. And (*b*) all (but Peers of the Realm) owe ſuit unto it, and muſt be ſworn to the King's Allegiance. And the (*c*) offendor for an Amerciament ſhall be diſtrained throughout the Precinct of the Leet; and that as well out of the Land holden of the Lord of the Leet (where the offence was done) as within it.

(*d*) 31 *H.*6. *Leet* 11. (*e*) 12 *H.*7.18. (*f*) 29 *E.*3.21. *Avowry* 247. (*g*) 6 *E.*4. 3. 7 *E.*4.23. *A writ of Error lieth there, and not a writ of falſe judgment.* (*h*) *St.*17 *E.*4. *c.*2. *ſo recciteth it.* (*i*) 13 *E.*4.8. *ib.* (*k*) 4 *M. Dy.* 133.

The Sheriffs turn, as an overſeer of this Court, is to (*d*) enquire whether the Tythings be whole or no: to (*e*) preſent defaults that are not redreſſed in the Leet: And if (for miſuſer or other cauſe) the Leet be ſeized into the King's hands, all the people ſhall come to the Sheriffs turn. But (*f*) otherwiſe the Sheriff in his turn hath no power to enquire of an offence done within the Leet.

A Court of Pypowders is a Court of Record (*g*) incident (*h*) to Faires and Markets: but by (*i*) cuſtome, a Court of Pypowders may be held out of Fair or Market; for all Actions ariſing there, by reaſon of any Contract, Covenant, Treſpaſs, Debt, &c. (*k*) And the ſuit muſt at the ſame time be commenced.

Statutes.

Statutes.

17 E. 4. c. 2. made perpetual, 1 R. 3. c. 6. No Plea ſhall be holden in Court of Pypowders, unleſs the Plaintiff or his Attorney ſwear that the matter of Declaration was done in time of the ſame Fair, and within Juriſdiction thereof; but that Oath ſhall be no concluſion to the Defendant; but that he may plead as he might before. Every Steward, &c. holding Plea contrary forfeiteth C l.

The King (by Commiſſion under his Letters Patents) but not by writ, may erect other Courts at his pleaſure. 42 *Aſſ. pl.* 12.

Such were Juſtices of Eyre, and ſuch Courts of Record in Corporations, and other places, by ſpecial Charters.

The King's Councel alſo is a Court, to deal with the puniſhment of Contempts, and called the Star-Chamber. But this is no Court of Law.

Statutes.

3 H. 7. c. 3. The Chancellor, Treaſurer, and Privy Seal, or two of them (calling unto them a Lord Temporal, and another Spiritual of the King's Councel, and the two chief Judges) may examine Riots, Maintenances, &c.

Theſe are the Courts of Record. A Court Baron is the Court of a common perſon, and is for perſonal accounts under the value of 40 s. For a Treſpaſs lieth not in a *F. N. B.* 239. *p.* *Br. juriſ.* 99. *F. N. B.* 239. *s.*

Court Baron of dammages above 40s And a Supersedeas lieth to the Sheriff, upon divers plaints in the County Court, every one under 40 s. when all are for one entire debt of 40 s. Or upon an Action of Covenant brought there to the dammage of above 40 s.

Br. Iett 32. These cannot be kept oftner than every three weeks. But so it be not oftner than from three weeks to three weeks, it may
21 *E.* 4. 5. be holden as often as the Lord will. And therefore to hold off one by doing Suit at his Court of D at Michaelmas at Easter, it is to be intended at his Court Baron; for though a Court Baron be commonly holden from three weeks to three weeks; yet Suit of Court may be once, twice, or thrice a year, as it is first reserved.

16 *H.* 7. 14. The Process here is by Precept to the Bailiff, good enough, though it be but by word: inasmuch as the trial in a Court Baron is all by the Country, and not by Records; for is but *matter enfait.*

6 *E.* 4. 3. The Suitors are the Judges both in an hundred Court, County Court, or Court Baron; and the Bailiff and Sheriff are but Ministers.

F. N. B. 82. A Court Baron is the Lords, or the County Court. The Lords is either of a particular Mannor or of a whole hundred.
(*a*) 34 *H.* 6. 49. For a Court Baron is incident to every (*a*)
(*b*) 13 *H.* 7. 19. Mannor and to every (*b*) Hundred.
32 *H.* 7. 17.

The hundred Court is that wherunto all the inhabitants within the hundred owe

ther ſuit, by reaſon of their Tenements. And is in effect but a Court Baron.

The County Court, which is incident to the Sheriff. For the Sheriff hath two Courts by the Common Law for government of the Shire, his County Court (wherein one ſhall have remedy againſt another for any matter between them) and the Sheriffs Turn. But the Pleas holden before him in the County Court are not of Record, though it be by Writ of Juſtices. 12 H. 7. 28. F. N. B. 32.

CHAP. II.

Of Writs Original.

Of an Action, there be two parts, Suit and Judgment. 10 El. Dyer 268. 5 El. Dyer 220.

Suit is the parties dealing in the Action: And therefore all that while it is ſaid to depend in Plea, but not after Judgment. The party that bringeth the Action, is called Plaintiff in a perſonal Action, Demandant in a real; he againſt whom it is brought, Defendant in the firſt, Tenant in the other; who for their help are allowed counſel learned in the Law.

Statutes.

Weſtm. 1. cap. 25. No Miniſter of the King may maintain another in any Action

Action in the King's Court to have part of the thing, or other profit by Covenant, upon pain of punishment at the Kings will.

Westm. 2. c. 49. None of the King's Officers shall take or purchase, or bargain for Land, Tenement, or Advowson, whilst the thing is in Plea, upon pain to be punished at the King's pleasure, as well the Purchaser as the other.

Artic. super chart. c. 11. Neither the King's Officer, nor any other, shall do so upon pain of forfeiting to the King so much of his Lands as amounteth in value to that he purchaseth. Any may sue for the King before the Justices before whom the Plea hangeth.

32 H. 8. c. 9. None shall buy, sell, or get or take, promise, or grant to have any pretensed rights or titles to lands, &c. except the seller, or those (by whom he claimeth) were in possessions, or took the profits by space of a year next before, upon pain that the seller, &c. shall forfeit the value of the land, and likewise the buyer knowing the same. Provided he that is in lawful possession by taking the yearly profits, may buy &c. anothers pretensed right.

Glouc. c. 8. Attorneys may be made in all Pleas where Appeals lie not.

Mer. c. 10. In suits, at a County, Tything, Hundred, Wapentake, or Court of the Lord.

Westm. 2. c. 10. A general Attorney may be made in all Counties where Justices do journey.

3 H.7.c. 1. An appeal of Murder or Death may be purſued by Attorney.

The ſuit hath two parts, the beginning and proceeding.

The beginning is the proper duty of the Plaintiff; and hath two parts.

The firſt matter of the ſuit, and original proceſs.

The firſt matter of the ſuit muſt always be brought in that County where the cauſe of ſuit groweth. As actions of debt upon an eſcape may be brought in the County where the arreſt or eſcape was, but not in any other County. A (a) treſpaſs of battery, goods carried away, or writings broken, may be brought in any County, for they are not local. Otherwiſe it is of trees, or graſs cut down, they muſt be brought in their proper County, if it be by bill, the County is ſet at the margent. 14 E.4.4. (a) 2 Mar. Br. attaint. 104. Br. bill. 35.

Statutes.

6 R.2. c.2. Debt, account, and all ſuch actions ſhall be brought in the County where the contract was made.

The firſt matter of the ſuit is for every man by Writ out of the Chancery, or in Courts where Writs lie not by plaint or bill; for the King alone by enquiry.

In all of the firſt kind, the plaintiff muſt find ſurety by ſome that will be pledges to proſecute the ſuit. And ſo is the form of every

every original, *Si* (the Plaintiff) *fecerit te ſecurum de clamore ſuo proſequendo*; the entry is, *Plegij de proſequendo Johannes Doe, Rich. Roe.* And theſe may be either to the Officer, or to the Court where the ſuit is.

9 E. 4. 27.

But a poor man, inſtead of ſureties, ſhall give his faith to proſecute it: Whereupon the form for him is, *Et niſi fecerit & prædict.* (the Plaintiff) *fecerit te ſecurum de clamore ſub proſequendo per fidem ſuam quia pauper eſt.*

Regiſt. fol. 228. & per Br. pledg. 29.

Writs that begin the ſuit are Original or Commiſſional.

Original, which appoint the firſt Proceſs, if the Plaintiff find the Pledges returnable in the Kings Bench or Common Place.

This muſt be (*a*) true Latin; for upon *habeas ibi hos* (*b*) *breve*, or *uxori* (*c*) where it ſhould be *uxor*, and ſuch like, the Writ ſhall abate, and beſide (*d*) formal, as the general to be put in demand, and in plaint before the ſpecial. As land is general to pree, paſture, wood, joncary, marſh, &c. Wood is the general of all trees growing, and therefore ſhall be put in demand before Alders and Willows, which are but *ſpecies* of it. The entire ſhall be demanded before the moiety or part or parts. The more worthy thing ſhall be demanded before the leſs worthy; as a meſſuage before land: for land that hath building upon it is more worthy than land without building. A Caſtle before a Meſſuage, or a Man-

(*a*) 2 E. 3. 4.
(*b*) 9 H. 7. 16.
(*c*) 3 E. 3. 86.
(*d*) 3 E. 3. *ibid.*

All this that followeth is the Rule of the Regiſter.

Mannor (and yet it may be parcel of a Mannor) But the reaſon is, becauſe a Caſtle is more worthy, as being a place of force and defence againſt the enemy in time of war, and againſt rebels in time of rebellion; a place in time of peace fit for the correction and impriſonment of great Malefactors, and a magnifical habitation of Noble men. So in a Replevin, if it be of two Chattels, one quick, and the other dead, the living thing ſhall be firſt demanded.

Alſo it muſt expreſs the name of baptiſm and ſirname; or in lieu thereof, the name of dignity both of the Plaintiff and Defendant; but not the name of his office, which is no dignity. As pr. q. r. *Johanni Ducis* (a) *Lancaſt.* is good, but not *Johanni Rectori* (b) *de D.* without expreſſing his ſirname But when an Officer is to ſue by reaſon of his Office, as a (c) Prebendary, (d) Parſon, Executor (e), Gardein (f) by Knights ſervice, &c. there he muſt expreſs the name of his Office: or when one bringeth an Appeal of murder, as brother and heir, &c.

Where there be many of one name, diverſity of the names muſt be put by addition of reign puiſne, &c. elſe the writ ſhall abate.

A Corporation may ſue by the name that they are corporate, without name of baptiſm or ſirname; as pr. q. r. *majori & communi civi L. &c.* or *Decano & Capitulo D. &c.*

18 *Ed.* 4. 17. *in annuity.* (e) 30 *H.* 6. 5. 33 *H.* 8. *Dyer* 50. 37 *H.* 6. 29. 27 *H.* 6. 3. *Staintes.*

(a) 8 *E.* 4. 24. *ſaith the reaſon is, becauſe there are in England no more Dukes of that name: and ſo it may well enough be known of whom it is meant: and alſo for the ſolemnity of the creation. But otherwiſe it is of Knights, for there are* 1000 *Knights in England, therefore there the Writ muſt be* præcipe J. S. *militi.*

(b) 27 *H.* 6. 3.

(c) 13 *E.* 3. *br.* 675. *in aſſ. real.*

(d) 12 *H.* 4. 20. *in aſſiſ.* 10 *H.* 7 5. *in waſte.*

(f) 9 *E.* 3. 465.

Statutes.

1 E.6.c.7. The acceptance of a new name of dignity shall not abate the writ.

The King's servants in his Court, or other by special grace of the Chancellour, may here be admitted to find pledges in the Chancery, And then the form is, *Quis præd.* (the Plaintiff) *fecit nos secures de clamore suo prosequendo pro C. de Com. L. & D. de Com. S. Summoneas*, &c.

Regist. fol. 228 & per. Er. pledg. 29.

CHAP. III.

Of Common Pleas.

Lit. 116.

WRits original are concerning Common Pleas or Appeals that concern life.

18 *E.* 4. 4.

These that concern Common Pleas, lie not for or against a feme covert without her husband; but (*a*) an appeal of felony against her doth.

(*a*) 1 *H.* 4.5. *Stamf.* 62. *a.*

20 *E.* 3. *Audit. Querela* 28.

Many having or giving jointly cause of action, may sue or be sued together in one, which is called Joinder in Action. As *A.* is bound to *B* in one statute Merchant, and after *A.* and divers others are bound to the same *B.* in another statute, and *B.* by one deed releaseth to them all, and after sueth execution severally: They shall join in an *Audita querela*, because of this joynt Release.

leaſe. So one *Decies tantum* ſhall be againſt all the Jurors that take money to give their verdict, for it is the entire act of all. 33 *H.*6. 28.

Several actions of one nature, as debt, and detinue (for theſe are of one nature, inaſmuch as the warrant of Attorney in a writ of detinue, and alſo the eſſoin ſhall be in *placito debiti*) may be joined in one original with ſeveral *præcipes* or commandments to be executed. 3 *H.*4. 13.

Prerogatives.

Here in place of action againſt the King petition muſt be made unto him in the **Chancery,** (*a*) or in (*b*) Parliament, for (*c*) no action did ever lie againſt the K. at the Common **Law,** but the party is driven to his petition, and (*d*) if the Eſcheator ſeize goods without cauſe, or ſeize the goods of one out-lawed, which outlawry is after reverſed, and account for them in the Exchequer; the party muſt ſue by petition for them. **And that** (*in the caſe of heretitaments*) though the King have granted the ſame away. For upon an office finding *J.S.* (who was attainted of felony or treaſon by matter of record before) to be ſeized of certain Land, if the King ſeize and grant it over; yet a ſtranger that hath right to enter, or bring his action, may do neither againſt the Patentee, but muſt to the King by petition, **whereupon Proceſs ſhall go out againſt the Grantee to maintain his title** As the King (*a b*) *Stamf. prer.* 73. (*c*) *Stamf. prer.* 42. (*d*) 34 *H.* 6. 5. 9 *H.*6. 15. *Stamf. prer.* 76.

grants over his wardſhip, or any other certain eſtate in the land. The *Scire facias* for him that ſueth the petition, muſt be againſt the patentee, not againſt the heir, in whoſe right the King is ſeized; for he is not to
7 *H* 4. 33. plead with the heir, but with the King, or him that hath his intereſt. And in a petition to revoke Letters Patents made to two, &c. a *Scire facias* upon it; the death of one of the patentees abateth not the petition; for the petition is not ſued againſt the patentees, but againſt the King; nor they need not to be named in the petition, but in the *Scire facias*.

4 *E.* 4. 24. **But whilſt perſonal things ſeized to the King remain in the Officers hands, the party that hath right may traverſe the Records that entitle the King, and ſo have his goods again, or ſue the Officer, or diſturb him to take the profits**: As where it is found that one out-lawed in a perſonal account was ſeized of certain land; and in this caſe he ſhall not be driven to a petition: otherwiſe it is in caſe of a freehold or inheritance.

9 *E.* 4. 52. **Petition is a ſupplication declaring the parties right, where mention muſt be made of all the King's title**, elſe it ſhall abate. For upon an iſſue in the petition found againſt the King, he ſhall be concluded for ever to claim by any of the points contained in the petition.

CHAP.

CHAP. IV.

Of Real Actions.

THese Writs concerning Common Pleas are real or personal. And they both again are *Præcipe*, or *Si fecerit te securum*. *Lit.* 116.

A *Præcipe* is that which willeth the Sheriff to command the Defendant to do somewhat in certain that the Plaintiff sueth for, which if he do not, then to serve the first process. The form is, *Præcipe A. quod reddat B. &c. Et nisi fecerit, &c. tunc summan. &c.* And is a *Præcipe quod reddat* which lieth for things in render, As of real things, land and such other things in demesne, rent, corrody, &c. of personal things, mony, goods detained, and the like. A *Præcipe quod faciat* which lieth for things not in render, whether they lie in Fealance as a Writ *de consuetudinibus & servitiis, Secta ad molendinum, &c.* or in sufferance, as a *quod permittat*, or in other things of any such like nature.

A *Si fecerit te securum*, is that which willeth the first process to be served without more ado. The form is, *Si A. fecerit te securum de clamore suo prosequendo tunc summon. &c.*

Real actions where a free-hold shall be 10 *E.* 9. 23.

recoverꝛd, are poſſeſſoꝛy oꝛ in the right.

Poſſeſſoꝛy, which are to recover a poſſeſſion, as all Aſſiſes, Writs of Ayel, Beſayel, and Coſenage.

In the right which are to recover a poſſeſſion mixt with the right, of all which examples do follow after.

F.N.B. 5. b. And both theſe may either be of a poſſeſſion oꝛ right in himſelf, oꝛ deſcended from his Anceſtoꝛs; which we call anceſtrel.

Real actions in the right, are either founded upon the right, oꝛ for the moꝛe right.

Statutes.

Merton c. 8. Seiſin of ones Anceſtor in a writ of right, ſhall be from the time of *Henry* the ſecond.

In a mortdaunceſter writ of Nieſe and of Entry, from the laſt return of K. *John* out of *Ireland*.

In an Aſſiſe of Novel Diſſeiſin, from *Henry* the thirds firſt paſſage into *Gaſcoign*.

Weſtm. 1. c. 38. Seiſin of ones anceſtor in a Writ of Right, ſhall be from the time of *Richard* the firſt.

In an Aſſiſe of Novel diſſeiſin and *nuper obiit*, from *Henry* the thirds firſt paſſage into *Gaſcoign*.

In a Mortdaunceſter, Coſenage, Ayel, Entry,

Entry, and Writ of Nieſe; from *Henry* the third's Coronation.

32 H. 8. c. 2. Seiſin in a Writ of Right ſhall be within ſixty years.

In a Mortdauncester, or in another poſſeſſory Action, upon the poſſeſſion of his Anceſtor or Predeceſſor, ſhall be within fifty years.

A Writ of the poſſeſſion of the Plaintiff himſelf ſhall be within 30 years.

An Avowry or Cognizance for rent, ſuit, or ſervices of the ſeiſin of his Anceſtor, or of his own, ſhall be within forty years.

Formedon in Remainder, Reverſion, *Scire facias* upon a fine, ſhall be within 50 years after the title accrue. If a man preſcribe in land, rent, or ſuch like, of the poſſeſſion of his Anceſtor or Predeceſſor, he ſhall alledge ſeiſin in them within 40 years next before the time of the Preſcription, Title, or Claim.

1 Mar. c. 5. The Statute of limitation of 33 H. 8. c. 2. ſhall not extend to a Writ of right of Advowſon. *Quare impedit, Jure patronatus*, Aſſiſe de Darrein Preſentment, droit de garde of any Lands holden by Knights ſervice; but the time of the ſeiſin alledged ſhall be as it was at the Common Law.

These kind of real Actions, *viz.* where the freehold ſhall be recovered, lie only againſt the tenant of the freehold. Therefore a releaſe of all Actions real is no Plea, *Lit.* 115.

unleſs he were Tenant of the Free-hold at the time of the releaſe; for elſe he had no cauſe of any ſuch action againſt him.

Old tenures f.2 Neither is any ſuch action maintainable againſt Leſſee for years, for he hath not the Free-hold. Nor the diſſeiſee cannot have a *Præcipe quod reddat* againſt the diſſeiſor,

6 E.6. Pl.87. which is partner of the profits for years only, notwithſtanding the Statute; be-

4 E.4.32. cauſe by the Common Law no action lieth againſt him. And for this cauſe alſo, *non* tenure of the whole, or though it be but of parcel of the thing demanded. Joint-tenancy with one not named in the Writ. Entire-tenancy of the whole, or ſeveral tenancy of parcel, when the writ is brought againſt two or more, are good Pleas in abatement of the Writ.

19 H.6.32.
22 H. 6.12.
45 E. 3. 5.
37 H.68.
27 H. 8.30.

Statutes.

25 E.3.c. 16. *Non* tenure ſhall not abate the Writ, but only for the quantity.

37 E. 3. c. 17. No writ ſhall be abated by knowledgment of villenage, if the Demandant or Plaintiff will averr that he that alledged the exception was free, day of the writ purchaſed, with the Free-holder may be joined in action, any having title to enter; as the Mortgager with the Mortgagee, the Lord with his Villein, but not the diſſeiſee with his diſſeiſor.

41 E.3.16.

CHAP.

CHAP. V.
Of a Plea of Land.

A Real *Præcipe quod reddat* is that which is for real things in render; and is a plea of land, or other such real, *Præcipe.*

A plea of land which is for land or other such things in demesne, where land in certain is demanded, it must always be brought in a ville, or place known out of any ville; and not in a hamlet which is parcel of a ville. But personal actions, as trespasses, and such like, may be in a hamlet. So of Dower and Assise; for there no land in certain is demanded; and also in an Assise, he shall recover by view of the Jury. So in a *Scire facias* out of a fine *nuper obiit*, a writ of mesne, covenant, waste, *quare impedit.* These may be in a hamlet. Otherwise it is of a writ of right of Advowson.

A plea of land is a writ of Entry, or a writ shewing the Demandants title.

A writ of Entry is that which is to disprove the Tenants possession by the means of his entry.

Wherein Tenant in Fee-simple demanding of the possession of his Ancestor, shall say in the writ, *quod clamat esse jus & hereditatem suam.* Tenant in tail, or for life, shall not so. But in his *Old N. B.* 124. *Fitz. N. B.* 201. *& f.* *Fitz. N. B. ibid.*

declaration ſet forth his ſpecial eſtate.

A Writ of Entry is either againſt the firſt party, or in the degrees.

Againſt the firſt party, when it is againſt him to whom the firſt alienation was, or that made the firſt diſſeiſin.

That in the degrees is in the Per, or in the Per and Cui.

In the Per, when he againſt whom it is brought, commeth in immediately under the firſt party, as heir unto him, or by alienation from him.

In the Per and Cui, when he againſt whom it is brought commeth in immediately under the firſt parties heir or alienee: For if more than theſe two alienations (the *Per*, or the *Per* and *Cui*) paſs, the demandant is driven to his writ of right. And the reaſon is, that there may be an end of ſuits. For no writ of Entry in the *Poſt* lay at the Common Law, but the ſame is given by the Statute of *Marlbridge*, c. 29. Which writ of Entry in the *Poſt* given now by that Statute lieth, when he againſt whom it is brought cometh in, neither in the *Per*, nor *Per* and *Cui*, then the writ ſhall be *In quod, &c. niſi poſt dimiſſionem, &c.* Out of all degrees, as by Abatement, Diſſeiſin, Eſcheat, Recovery, Election, Succeſſion, Dower, Judgment, &c. or as the third or more Feoffees.

The form of all which is thus. In a writ of Entry, in the nature of an Aſſiſe, againſt the party himſelf that did the diſſeiſin,

Præcipe

Præcipe A. quod reddat B. unum Meſſuagium, &c. de quo A. injuſte & ſine judicio deſeiſivit B. &c. or in the other form *diſſeiſivit C. patrem*, or other Anceſtor of *B. cujus hæres ipſe eſt, &c.* In the *Per* thus. *In quo idem A. non habet ingreſſum niſi per C. qui illud ei dimiſit qui injuſte B. &c.* (or in the other form) *qui injuſte &c. E. patrem, &c. præſtit. B. &c.* In the *Per* and *Cui* thus. *In quod, &c. niſi per C. cui D. illud dimiſit qui inde injuſte B.* (or in the ſecond form) *qui injuſte E. patrem, &c. præd. B.* In the *Poſt* thus. *In quod, &c. niſi poſt diſſeiſinam quam D. injuſte fecit præd. B.* (or in the other form) *injuſte fecit E. patri, &c. præd. B. &c.* In ſuch like manner it is of a *Dum fuit infra ætatem* and of all other writs of Entry upon an alienation. *Marl. c.* 29.

Writs of Entry grow either without wrong at the firſt, or upon a wrong.

Thoſe without a wrong at the firſt, are grounded upon a determination of the firſt eſtate, or a diſability in the perſon that made it.

Upon a determination of the eſtate, either by reaſon of a particular eſtate ended, or a condition broken.

Of a particular eſtate ended is an *ad terminum qui præteriit*, or *Entry ad Communem Legem.*

Ad terminum qui præteriit, is upon a deforcement by the leſſee or a ſtranger after a leaſe for years, or life expired, whether the Leſſee did alien, or not. But not after

the death of Tenant in Dower, or by Curtesie, for that is not properly called a Term.

Entry *ad communem legem* is, when Tenant for life, be it his own or anothers life, Tenant in Dower or by Curtesie of *England* doth alien and die, and he in the reversion for life, may have this Writ.

Of a condition broken, as *Causa matrimonij prælocuti. Causa matrimonij prælocuti*, is for a woman that giveth land to a man to marry her, and he will not: but it lieth not for a man that giveth lands to a woman.

Grounded upon the disability, are *Dum fuit infra ætatem*, and *Dum non fuit compos mentis*.

Dum fuit infra ætatem is by the infant, when he cometh to his full age, upon an alienation by himself, or his ancestors being within age.

But the clause that he is of full age, *viz. qui plene est ætatis*, shall not be inserted in the writ, if either it be brought in the degrees, *Per, cui*, or *post*, or upon the ancestors alienation.

Dum non fuit compos mentis is upon the alienation of himself, or his ancestors, being of *non sanæ memoriæ*.

Those upon a wrong at the first are either upon a discontinuance, or an ouster.

Upon a discontinuance, as a *Cui in vita*, or a *Sine assensu capituli*.

A *cui in vita* for the wife after the husbands death upon his alienation of her

sex-

fee-simple, fee-tail, or free-hold, whether Dower or otherwise, or of such a joynt estate in them.

And in this writ claiming a fee-simple; but not an estate Tail or Free-hold; for there the writ shall make special mention of the estate, she shall say, *Quod clamat esse jus & hereditatem suam*; though it be of her own possession.

Statutes.

Westm. 2. c. 3. A *cui in vita* given to the wife after her husbands death, upon his losing of the Land by default. And the Tenant that recovered against her husband must maintain his own right.

If it be an estate of fee-simple, and she dying not in her life time a *cui in vita*, the heir shall have a *Sur cui vita*. But of an estate tail only, a Formedon lieth in this case for the heir.

And of this nature is a *cui ante divortium*, when it is brought by the wife after divorcement, upon such an alienation as before.

A *sine assensu capituli* is for the Successor of a Bishop, Abbot, Prior, Dean, Prebendary, or Master of any Hospital, after the discontinuance of the Predecessor, viz. when they alien the Lands they have in the right of their Church, House, Abby, or Priory, without the consent of their Covent, Chapter, or Conferers, &c.

Upon

Upon an ouster, or either upon an intrusion or a disseisin.

That upon an intrusion is called a writ of intrusion, and is for him in the reversion or remainder in Fee-simple, or for life, not in tail (for he shall have a Formedon) nor for years, because he hath not the freehold, after the death of tenant for life in Dower, or by courtesie.

And if Land be given to two, and the heirs of one, and he that hath fee dieth, and after him tenant for life dieth; now the heir of him in the remainder shall have this writ. And it lieth also for the assignee of the assignee of him in the remainder.

Upon a disseisin, is when the disseisin is done to him or his Ancestors. As a writ of Entry in the *Quibus*; or which is all one in the nature of an Assise.

Writs that shew the demandants title, are meer possessory, or in the right.

Meer possessory are those which are brought by the next heir upon an abatement after the death of an Ancestor, other than his Father, Mother, Brother, Sister, Uncle, Aunt, Nephew, Niece; for upon an abatement after the death of any such Ancestor, an Assise of Mortdauncester lieth, as shall appear afterwards: seized in demesne, as of a Fee-simple the day of his death, though he were disseised the very same day, and so died not seized at all. Of this nature are,

A writ of Ayel after the death of his Grandfather or Grandmother.

A writ of Besayel after his great Grandfather or Grandmother.

A writ of Cosinage after the death of his great great Grandfather or Grandmother, or any other collateral Cosin, as the great great Grandfathers brothers.

Statutes.

West. 2. c. 20. In a writ of Cosinage, Ayel and Besayel, the point shall be enquired whether the Demandant be next heir as well as in a Mortdaunceſter.

In the right, is that which is to dispose the right of the Tenant, and is a writ of right in his nature, or a *Præcipe in Capite*.

A writ of right in his nature, which sheweth how the Demandants right is grown. And is a Formedon, or a writ of Escheat and Dower, *unde nihil habet*.

A Formedon is a *Præcipe quod reddat*, entitling the party by the form of the gift.

And is a Formedon in Remainder, or a Formedon in reverter: for a Formedon in descender lieth not at the Common Law, but is given by the Statute of West. 2. cap. 1. *Old Nat. Br.* 1. *Br. Form.* 69. 3 *El. Pl.* 235. (a) *Old Nat. Br.* 148, 149.

A Formedon in remainder is for him in the remainder for (a) life, or in (b) fee upon a leaſe for (c) life expired. For after an (b) *F. N. B.* 217. d. (c) *Fitz. ibid.*

estate

estate tail expired, it lay not at the Com-
ante 112. mon Law; because it was a Fee-simple, whereupon a remainder could not depend.

Fitz. N.B. 219. C. ¶ Formedon in reverter is for the heir after the issue in tail determined, as at
30 E. 1. Form. 65. the Common Law, if the donee alien before issue had, and after die without issue: or if he have issue, and after he or his issue die without issue. Contrary it is if he had issue, and then had aliened, and died without issue.

¶ A writ of Escheat is for the Lord that hath a Seigniory in fee, or for life upon an Escheat.

Dower, *unde nihil habet*, is a writ for
Old Nat. Br. 6. ones dower, which hath received no part at all of it.

Statutes.

Westm. 1. c. 48. A writ of Dower *unde nihil habet*, shall not abate, though she have received part of her Dower before the writ purchased, unless it were of the same party against whom the writ is brought, and in the same Town.

Br. præc. q. d. redd. 35. ¶ A writ of dower lieth against Gardein by Knights service, though he be not tenant of the Free-hold.

Fitz. N.B. 5. f. A *præcipe in capite* is a *præcipe quod reddat*, for the meer right; and therefore lieth only for Tenant in Fee-simple of Lands holden in chief.

Statutes.

Statutes.

Westm. 2. c. 4. In a place of a writ of right, a *Quod ei deforceat* is given to Tenants for life, or in tail, upon losing by default.

CHAP. VI.

Of a writ of right of ward, and a writ of right Sur disclaimer.

OThet real *præcipe quod reddat*, are those which are in respect of a Seigniory, as a writ of right of ward, and a writ of right Sur disclaimer.

A writ of right of ward is to recover the wardship: If of the body, it lieth both for Gardein in Soccage, and by Knights service: If of the Land, it lieth only for Gardein by Knights Service. *Fitz. N.B.* 139.

Statutes.

Marlb. cap: 7. In a writ *De communi custodia*, if the Deforcer come not at the grand distress, the same writ shall be reiterated as oft as well it may be within half a year following, and every time the

the Writ read, and Proclamation made in the County Court, if he come not to answer, nor the Sheriff find him within half a year, he shall lose the custody. Saving to action another time, if he have right.

West. 2. c. 35. In a writ of ward of land, or heir, or both, either of the parties dying before the Plea determined, a resummons shall be. And in the grand distress day must be given, that three County-days may be holden before the return, in every of which Proclamation shall be made, whereupon the Defendant not appearing, Judgment shall be given for the Plaintiff. Saving the right of the Defendant, if afterwards he will claim it. So shall it be done in a writ of Ejectment of gard.

13 *H.* 7. 27. A writ of Right *sur disclaimer* is for the Lord, to prove the lands to be holden of him, when in an action where the services should be recovered, as in an Avowry made upon the Tenant for them: for there he shall recover the services inclusive, inasmuch as he is to have a return in an Assise, or *præcipe quod reddat* of rent (for there the services are expresly demanded) but not in a *per quæ servitia* (for there no services but Attornment only is demanded) nor in a justification, in a replevin, or an avowry in an action of Trespass (for there the defendant shall never have a return, nor recover his services expresly nor includedly, the Tenant in Court of Record, *viz.* in the Common place,

Ibid.

5 *E.* 4. 2.
13 *H.* 7. 27.
15 *E.* 4. 29.

Old N. Br. 162.

place, but not in Court Baron, or County Court. For there, if the Lord make Avowry upon the Tenant, and he disclaim to hold of him, the Lord shall be amerced, disclaimeth to hold of him.

And if in this writ of right sur disclaimer, he can prove the land to be holden of him, he shall recover the land it self for ever; because the disclaimer is of record. Therefore by such a disclaimer he is barred of all possessory actions for the services, as an Assise, Cessavit, Ravishment of ward, and such like; but not of a Writ of Eschear, Right of ward, Right of customes, and services, &c. And though the Lords distress and avowry were lawful, yet the Tenant so disclaiming shall recover dammages of him; for the disclaimer giveth the Lord a better advantage, viz. the Land it self. *Ibid.* 16 *H.*7.1. 34*E.*3.*Disc.*24 16 *H.*7.1.

Statutes.

Westm. 2. c. 2. If the Tenant disclaim in County Court, or other Court not of Record, the Lord may remove the plea before the Justices, to cause it to be of Record, so as he may have a writ of right *sur disclaimer.*

Glocest. c. 4. & Explanat. c. 4. when land is given in Fee-farm, rendring or doing so much as amounteth to the fourth part of the value of the land, if he (whose land is charged) let it lie fresh by two years, so as no distress can be found in it, nor

not render, or do that which is contained in the writing, the other shall recover the Land by a Cessavit. But the donee coming before Judgment, if he render the arrearages and dammages, and find sufficient to do from thence forth, that which is contained in the writing, shall retain his Land.

Westm. 2. cap. 21. If a man detain from any Lord his service due by two years, the Lord shall recover the Land by a Cessavit. This lieth also for the heir of the Lord against his tenant, his heirs, or those to whom he alieneth the Land.

Westm. 2. c. 41. So if Religious Houses that have Land given them, &c. withdraw the alms, &c. by two years, the donor shall have the like action.

CHAP. VII.

Of a Writ De Consuetudinibus & Servitiis, *and* Secta ad molendinum.

A Real *præcipe quod faciat* is either to recover hereditaments, or some real thing that concerns them.

F.N.B. 151. g. Those that are to recover some hereditament; demanding of ones own seisin are in the *debet* and *solet*; demanding

manding of the ancestor seisin, they are in the *debet* only, and then are in all respects as writs for the meer right, that is to say, are triable by battel or grand Assise.

These are either in respect of a Seigniory, or to recover some other heriditament.

In respect of a Seigniory, as a writ *De Consuetudinibus & Servitiis*, and a *scilicet ad molendinum*,

A writ *De Consuetudinibus & Servitiis* lieth for the Lord that hath an estate for life, or a greater estate, in the Seigniory, and is deforced of his services. F.N.B. 151. b.

Scilicet ad molendinum lieth for the Lord, when the Tenants that hold of him by grinding their corn at his Mill, withdraw their suit, and grind elsewhere. F.N.B. 122. m.

Statutes.

Marlb. c. 9. The Process either where the Lord distraineth against the form of this Statute, or the Tenants withdraw the suits due, is attachment (wherein only Essoin is allowable, and deliverance of the distress incontinently to remain so till the plea be ended) *venire fac.* and the grand distress. At which day not appearing, the distresses delivered shall so remain till recovery in the Kings Courts, till which time the Lord (in case he be Defendant) must distrain no more, and the Plaintiff shall be dismissed without day, if the Defendant come to answer, and the matter pass a-

gainſt him, the Plaintiff ſhall recover dammages.

This of dammages to be recovered (in caſe where the tenant is defendant) is to be underſtood of withdrawing the ſuit from the Lord himſelf, and not from his Predeceſſors.

CHAP. VIII.

Of a Quare Impedit, *and a* quod permittat.

FOr other Hereditaments are a *quare impedit*, and a *quod permittat*.

Fitz. N.B. 33. *b.* A *quare impedit* lieth upon a diſturbance, where he, or his anceſtors, or thoſe from whom he claimeth, having at any time before preſented to a Church, himſelf is now diſturbed.

Statutes.

25 E. 3. c. 3. Stat. 3. Upon the King's collation or preſentment to a benefice, his title ſhall be well examined, and being found before judgment untrue or unjuſt, the collation or preſentment ſhall be repealed. And the patron or poſſeſſor which ſheweth the falſe title, ſhall have thereupon Writs out of the Chancery, as many as are needful.

Marlb.

Marlb. c. 12. In a *Quare Impedit*, and Assizes of Darrein presentment, day shall be given from fifteen days to fifteen days, and from three weeks to three weeks. And in a *quare impedit*, the process shall be a summons, attachment, or grand distress.

Westm. 2. c. 5. If Coparceners make partition to present by turn, and one of them present accordingly, he that is afterwards disturbed shall have a *Scire facias* (and not be driven to his *quare impedit*) and recover his presentation with dammages.

An Avowson (after the death of one that hath presented) being assigned in Dower, or to tenant by Courtesie, & they present, the heir, if he be disturbed after their death shall have a *quare impedit*, or Darrein presentment at his pleasure. So of an Avowson demised for life, years, or in tail, when six months pass hanging a *quare impedit* or Darrein presentment, so as the Bishop presenteth by lapse, the patron shall recover dammages to two years value of the Church: otherwise dammages to half a years value. The disturber not being able to render dammages, shall in the first case have imprisonment of two years, in the second of half a year.

A *quod permittat* lieth for one that hath Common of pasture for his beasts, being disturbed by a stranger, so as he cannot use his Common. *Fitz. Nat. Br.* 123. *f.*

CHAP. IX.

Of a Curia claudenda, *Writ of Covenant real, meſne and* warrantia charta, *where of fines.*

THoſe that are to recover ſome real thing concerning Heriditaments are a *Curia claudenda*, or a Covenant real, and other Writs founding in that nature.

F.N.B. 128.*a.* *F.N.B.*127.*b.* *&* 128. *a.* *F.N.B.* 136.*f.* A *Curia claudenda* lieth for a Free-holder, not for a Tenant for years, when one that hath a Cloſe next adjoyning to him, which he ſhould keep enclоſed, will not do it. A Writ of Covenant real lieth upon a Covenant to do a thing real, as to levy a fine of Lands, &c. Writs in the nature of a Covenant real, are a writ of meſne, and a *Warrantia charta*.

*F.N.B.*135.*m:* A Writ of meſne lieth for the Tenant againſt the meſne, when the Lord paramount doth diſtrein the Tenant whom the meſne ought to acquit.

Statutes.

Weſtm. 2. cap. 9. The Tenant diſtreſſed by

by the chief Lord, may have a Writ in the County where he is diſtreined againſt the Meſne, who having Land in that County, and not appearing till the grand diſtreſs, day ſhall be given in the grand diſtreſs, ſo as two Courts may be holden before the return; wherein the Sheriff ſhall proclaim that he come to anſwer the Tenant at the day. At which day if he come not, he loſeth his ſervice, and the Tenant ſhall hold of the chief Lord by the ſame ſervices that the Meſne held. The chief Lord may not diſtrein the Tenant of the Demeſne if he offer the Service due: And exacting of him more than the Meſne ought to do, that Tenant ſhall have the remedy that the Meſne might have.

Upon a return that the Meſne had nothing to be ſummoned by, an Attachment ſhall go out, and upon a *nihil* returned, the grand diſtreſs with proclamation as before.

The Meſne having no Land in that County, but in another, upon ſuch a return by the Sheriff, the party ſhall have a Writ Judicial to ſummon the Meſne in that County where it is teſtified that he hath Lands; and both there, and in the other County, ſhall proceed to the grand diſtreſs, and Proclamation and Judgment as before.

The Meſne coming into the Court and

acknowledging, or being adjudged to acquit his tenant, and not doing it, the tenant shall have a Judicial writ of acquittance. Whereupon if the mesne come in, and the tenant can aver that he hath not acquitted him, he shall be satisfied of his dammages, and be quit of the mesne, and hold of the chief Lord; and if the mesne come not at the first distress, then another distress shall go out, and proclamation, and so proceed to Judgment as before.

This Statute extendeth only where there is but one mesne between the Lord that distraineth and the tenant, the mesne of full age, and the tenant tenant in Fee-simple.

A *Warrantia Charta* lieth for him that hath Lands or Tenements warranted unto him either by feoffment (a) release, or confirmation with clause of warranty, where his hereditaments are liable from the time of the action brought. Therefore it is policy for one to bring his *Warrantia Charta* before he be sued. For upon vouching when he is once sued, he recovereth in value but such Lands as the vouchee had at the time of the voucher.

F.N.B. 134. *d.*
(a) 12 *H.* 4. 24.

F.N.B. 134. *k.*
22 *H.* 6. 22.

And upon these writs of (a) Covent real, (b) mesnes, (c) warranty of Charters, as also upon a Writ of (d) customes and service, a fine may be levied.

(a) 42 *E.* 3. 5.
(b) *T. H. Fitz.*
(c) *John per Dy.* 179.
(d) 21 *E.* 3. 18.

A fine is the acknowledging of an hereditament in the King's Court according to the covenant, to be his right that doth com-

complain. He that complaineth is called Plaintiff, and the other Deforceant. And this acknowledging of it to be ones right is called, *A fine sur conveyance de droit*; but if the right be acknowledged to be his, as that which he hath of the gift of the Conisor, it is called a *Fine sur conisance de droit come ceo que ad de son donne*. The form of a fine is, *Hæc est finalis concordia facta in curia d'ni Regis, &c. unde plac' conventionis pendet in ead' curia &c. qd. præd. I. S. recognovit tenementa præd. esse jus ipsius A. &c.*

A fine may be levied upon a writ of warranty of Charters, for it is in effect but a Covenant between the parties before the Justices, and entred of Record. And before the Statute of *Westm. De hiis quæ concordata sunt* (which giveth a *scire fac.*) if the fine were not executed, the party should have a writ *De fine facto*, and recover damages only, which proveth that a fine is but a Covenant of Record. 42 *E.* 3. 5. 40 *E.* 3. 7.

Where one of them must needs have such an estate at the time of the fine levied, for against the plea that the parties to the fine had nothing, &c. it is no good replication that the parties were seized, &c. for if one of them were seized it is sufficient. Which form of pleading (*viz.* that one of the parties was seized) proveth, that if he have left an estate for years the fine is void. And a fine of the Land it self will pass away a Reversion depending upon an Estate for life. And this is as it were a 22 *H.* 6. 57. 27 *H.* 8. 4. 37 *H.* 6. 5. 7 *Eliz. Plo.* 360.

Lit. 12. *is that in a feoffment made* en pais, *&c. where a freehold passeth, be it by deed or without, there must needs be livery of seisin, which words* (en pais) *are put to exclude fines that are feoffments of Record.* 18 *E.* 4. 22. 36 *H.* 8. *Br. fines* 118.

feoffment of Record. So as a Freehold passeth thereby without any livery of seisin. That whereof the fine is levied, or any thing contained in it, as a Rent-common, *&c.* out of the Land, and Estate for years, or other Estate in the Land, *&c.* may be granted back again to the Conisor by the same fine. And this is called a fine *Sur grant & render*; the form whereof is, *Et pro hac recognitione, &c.* The Conisee *concessit* to the Conisor, *præd' tenem' cum pertinen' & illa reddidit in eadem' curia haben'*, to the Conisor, &c. for none can take the first Estate but those that are named in the Writ of Covenant; but every stranger may take a remainder. As *A.* levieth a fine to B. who rendreth it back to *A.* and *E.* his wife, &c. In this case *E.* hath no Estate, for she was not party to the Writ.

Statutes.

27 H. 1. Stat. 1. cap. 1. *De finibus levatis.* Exception against a fine, that the Plaintiffs or Defendants, or their Ancestors, were always seized of the Lands contained in the fine, shall not from henceforth be admitted in the parties to the fine or their heirs.

The fines shall two days in the week be publickly and solemnly read, and all pleas cease in the mean time.

5 H. 4. cap. 14. All Writs of Covenant and other, whereupon fines be levied, the

Dedi-

Dedimus poteſtatem, and all knowledges and notes of the ſame, before that they be drawn out of the Common Bench by the Chirographer, ſhall be inrolled in a roll to be of record for ever. Out of the which execution ſhall be had, if the notes or fines ſhall be imbezelled.

23 Eliz cap. 3. Every Writ of Covenant, or other writ whereupon any fine is levied, the return thereof, the *Dedimus poteſtatem*, and return thereof, the concord, note, and foot of the fine, the proclamations and the Queens ſilver. Alſo every writ of Entry in the *poſt* or other writ, whereupon any common recovery is ſuffered, the writs of ſummons *ad warrantizandam*, and the returns of all theſe writs, and every Warrant of Attorney may at any mans requeſt be inrolled. Which enrollment ſhall be of as great force to all purpoſes in Law, as the things themſelves, if they were extant.

No fine, proclamation, or common recovery ſhall be reverſed by writ of Error, by reaſon of falſe Latin, raſure, enterlining, miſentring of the Warrant of Attorny, or of any proclamation miſentring, or Non-return of the Sheriff, or by reaſon of any other defect of form in words, and not in matter of ſubſtance.

Fines executed bind all perſons, if claim be not made within a year, therefore it is called a fine, Quia finis finem litibus *Lit.* 104.

7 *Ed.* 2. 37. *Cont. claym.* 7.

litibus imponebat. And in a fine upon a render, if the Coniſee ſue not execution within the year, but after the year, by a *Scire facias*, no ſtranger need to lay his claim.

Statutes.

34 Ed. 3. c. 18. The plea of Non-claim of fines from henceforth to be levied, ſhall not be any barr.

34 H. 7. c. 24. Every fine after the groſſing ſhall be proclaimed in the Court the ſame Term and the three next, four ſeveral days in every Term, all Pleas ceaſing the whilſt. Which proclamations ſo made, the fine ſhall conclude all privies and ſtrangers, except women covert, perſons within 21 years of Age, in Priſon, out of the Realm, or if *non ſane memoriæ* (being no parties to the fine.) So they or their heirs take their action, or lawful entry within five years after thoſe imperfections removed. Saving to all perſons, and their heirs (other than parties) the right claim and intereſt which they have at the time of the fine. So that they purſue it by action or lawful entry within five years next after the proclamations. And ſaving to all other perſons ſuch right, title, claim, and intereſt, as firſt ſhall grow, remain, or come to them after the proclamation, by force of any matter before the fine. So they take their right according to the

the law, within five years next after it grew, &c. And those that be Covert-baron &c. at the time when it groweth, &c. that they or their heirs take their actions, or lawful entry within five years after those imperfections removed.

Saving also to all not parties, nor privies the exception that none of the parties, nor any to their use, had any thing in the Lands at the time of the fine.

31 H. 8. c. 36 All fines levied by any person of 21 years of age of Lands entailed before the same fine, to himself or his ancestours in possession, reversion, remainder or use, shall immediately after proclamation made, be a sufficient barr against him and his heirs, claiming only by such entail, and against all other, claiming only to his use, or the use of any heir of his body.

1 Marib. c. 7. All fines whereupon proclamations be not, or shall not be duly made (by reason of the adjournment of any Term by Writ) shall be as good as if any Term had been holden from the beginning to the end, and Proclamations therein made according to the Statute.

31 Eliz. c. 2. Proclamations of fines shall be only four times, *viz.* once in the Term wherein the fine is ingrossed, and once every of the three Terms next after.

A Feme-covert joyning with her husband *Lit.* 149.

band in a fine it bindeth her for the
Therefore here the Justices must examine
15 *E.* 4. 1. her, to see that she do it willingly. For if
she say upon her examination, that the hus-
band did imprison her to levy the fine,
this fine is not to be received. A grant by
fine of a Seigniory, Rent-charge, Rent-
seck, remainder, or reversion, is presently
good. Save for bringing actions that run
in privity between the Tenant and him.
48 *E.* 3. 15. As an Action of Waste or *Cohsimili casu*,
when the reversion of Tenant for life is
granted by fine, and after Tenant for life
alieneth in fee, a Writ of Escheat or
Ward, when the Tenants services are
granted by fine, and after the Tenant
dieth without heir, or his heir within
37 *H.* 6. 5. age. But in these cases he may enter for
a Forfeiture or Escheat, and seize the
Ward; and shall also be received upon
default of Tenant for life.

CHAP. X.

Of an Assise and Juris utrum.

THus much of real *Præcipes*. Real *si fecerit te securum*, are an Assise, and *Juris utrum*, or other.

F.N.B. 177. *d.* An Assise is such a real Plea merely in possession.

In Assise of ones own only possession is an Assise of Novel Disseisin, or an Assise of Nusance. In Assise of Novel Disseisin is for a Free-holder against his disseisor, whether it be of Land or Rent, or the Bayliff of the disseisor, if himself cannot be found: And being of a Rent-charge, or Rent-seek, all the Tenants of the Land, we call them *terretenants*, must be named, and the whole Land put in view, though he were disseised by one Tenant only. If the Lord distrein the Tenant too often for the Rent or Services: that is to say, such as too great a distress may be taken for, as Rent-service, &c. but not for fealty, suit of Court, &c. for which there cannot be any too great distress. And whether it be the Lord mediate or immediate, the Tenant may have an assise: the reason is, for that the Tenant cannot make rescouse. 31 *Ass. pl.* 31. 32 *Ass. pl.* 10.

Statutes.

Magn. chart. cap. 12. Assises of Mortdauncester, and of Novel Disseisin, shall not be taken but in their proper County by the Justice of Assise; and if they cannot be determined there, they shall be determined by the same Justices in their journey: upon a difficulty of any points, they shall be reserved to the Justices of the Common Place, and there determined.

Westm.

Weſtm. 2. cap. 18. 13 E. 1. Stat. de Mercator. 27 E. 3. cap. 9 Tenant by *Elegit* by Statute-Merchant, and by Statute-ſtaple, ſhall have an Aſſiſe of Redisſeiſin.

Weſtm. 1. cap. 47. The Gardein or the Lord enfeoffing one of parcel of Land in his hand, the heir may preſently have an Aſſiſe of Novel diſſeiſin againſt the Gardein and Tenant, and the Gardein ſhall loſe the Ward, and all the remnant that he holds of the heirs for life.

Weſtm. 2. cap. 25. A man ſhall have an Aſſiſe for Eſtovers of Wood, profit to be taken in wood of Nuts, Acorns, and other fruits of Corrodies, delivery of Corn and other Victuals and neceſſaries of Money to be received yearly in a place certain of toll, trorage, paſſage, pontage, pawnage, and ſuch like, to be taken in places certain. Cuſtodies of Woods, Parks, Foreſts, Chaſes, Warrens, Gates, and other Bailywicks and Offices in fee. And in all theſe caſes the Writ ſhall be *De libero tenemento*. Likewiſe an Aſſiſe is given for Commons of Turve-land, fiſhing, and ſuch like Commons which a man hath appendant to a Free-hold, or without a Free-hold by ſpecial Deed, at the leaſt for term of his life.

Weſtm. 1. cap. 24. An Aſſiſe given againſt

ginſt Eſcheator, Sheriff, or other Bayliff of the King, that ſeizeth any Lands by colour of his Office, without ſpecial warrant or commandement, or certain Authority that belongeth to his Office ſo to do, and double dammages to be recovered.

Weſtm. 2. cap. 25. When Tenant for years, or in ward, alieneth in fee, the remedy ſhall be by an Aſſiſe, as well againſt the Feoffer as the Feoffee, during the life of either of them. If by the death of either of them remedy fail by that Writ, then the remedy ſhall be by a Writ of Entry.

7 Rich. 2. cap. 10. An Aſſiſe of Novel Diſſeiſin of Rent out of Tenements in divers Counties, ſhall be in the confine of the ſame Counties.

Weſtm. 2. cap. 25. In an Aſſiſe, if one named a Diſſeiſor do perſonally alledge an exception, whereby the taking of the Aſſiſe may be deferred, as that another time an Aſſiſe of the ſame Land paſſed between the ſame parties, or that there is a Writ of higher nature hanging, &c. and hereupon voucheth Rolls or Records to warranty, and at the day given him, he fail of that he vouched, he ſhall be adjudged a Diſſeiſor, without taking an Aſſiſe, render double dammages, and have a years impriſonment. If ſuch exception be alledged by the Bayliff in the abſence

abſence of his Maſter, the taking of the Aſſiſe and Judgment ſhall not thereupon be delayed. But his Maſter afterwards offering to prove before the ſame Juſtices, ſuch an exception ſhall have a *Venire facias* for the Record, which if the Juſtices ſee, might have been available to have barred the Plaintiff, they ſhall award a *Scire facias* againſt him that recovered, wherein the Defendant ſhall recover again his ſeiſin and dammages, with his double dammages ſuſtained ſince the firſt judgment and impriſonment of that party that recovered. In like manner, if the Defendant, againſt whom an Aſſiſe paſſed in his abſence, ſhew any Deed, Releaſe, whereupon the Jury were not, nor could not be examined, becauſe there was no mention of them in the pleading, the Juſtices, upon ſight of thoſe writings, ſhall award a *Scire facias* againſt the party that recovered, and cauſe the ſame Jurors to come before them. And the writings being proved true by their verdict, or by the enrollment of them, like puniſhment ſhall be as before.

Weſtm. 2. cap. 30. The Jurors ſhall not be compelled to find a diſſeiſin, or no diſſeiſin, but may give their verdict at large.

Merton. c. 3. A man diſſeiſed recovering his ſeiſin by Aſſiſe of Novel Diſſeiſin, or confeſſion of the party, and having the ſame delivered him by the Sheriff, if he be

again disseised of the same Tenement, by the same disseisor, shall have a Writ of Redisseisin to command the Sheriff, taking with him the Keeper of the Pleas of the Crown, and other lawful Knights, in proper person to go to the Land, &c. and by the first Jurors, and other lawful men, to make enquiry. This must not be without special commandment of the King.

Westm. 2. cap. 26. A writ of redisseisin shall lie for them that have recovered by default, redition, or otherwise, without Recognition of the Assises and Jurors.

Perton. cap. 3. There disseisor shall be imprisoned.

Marlb. cap. 8. And not delivered without special commandment of the King, and besides shall pay a fine.

Westm. 2. cap. 26. He shall answer double dammages, and not be repleviable by the common writ.

Westm. 2. cap. 8. In fine, writs of redisseisin must be inrolled in the Chancery, and a Transcripsit thereof shall be sent into the Exchequer in the end of the year.

An assise of Nusance is for him whose free-hold is spoiled by any Nusance; for if he have but a Lease for years in the Land, he shall not have an assise of Nusance, but an action upon his Case. *F. N. B. 184.*

Statutes.

The form of the writ F. N. B. 195.

14 *El. Dy.* 310. *is that the 3 points to be inquired in a Mortdauncestor (all expressed in the writ) are* 1. *whether the Ancestor were seized in fee day of his death.* 2. *Whether the Demandant be his next heir.* 3. *Whether the Ancestor died within 50 years next before the writ purchased.*

(*a*) *F. N. B.* 196. *k.*

(*b*) *F. N. B.* 195. *d.*

4 *El. Pl.* 239. *F. N. B.* 195. *d.*

Westm. 2. c. 24. Giveth an Assise of Nusance against him to whom the Tenement is alienated after the Nusance is made.

6 R. 2. c. 3. The Plaintiff, if he will, may have a writ of Nusance in the nature of an Assise, determinable before the Justices of one Bench or other, or before the Justices of Assise.

An Assise of his ancestors possession only called an assise of Mortdauncestor, is for the next heir upon an abatement after the death of his father, mother, brother, sister, uncle, aunt, nephew, or neece: for of other Auncestors, a writ of Ayel, Besayel, or Cosinage, and not a Mortdauncestor lieth, who was seized in demesne as of a fee (*a*) simple the day (*b*) of his death, though he were disseised the very same day, and so died not seized at all. But upon Lands given to one and his second wife (he having a son by a former) and the heirs of their two bodies, their son cannot have a Mortdauncestor (after the death of his father overliving the second wife) for he is not next heir, but his elder brother: and therefore, by the Common Law, he was driven to a Formedon *in descender*, which was nothing else but a writ formed upon his case. So if the Auncestor were seized in tail, the remainder to his right heirs, a Mortdauncestor lieth not, for thereof the Demesne

Demesne he is seized in tail, not in fee.

Statutes.

Magna charta cap. 12. *vide supra.*

Marlb. cap. 16. A Mortdauncestor given against the Lord that will not render the Land to his Ward at full age.

Westm. 2. cap. 4. If a woman having no right, recover dower against a Gardein, the heir at full age shall have a Mortdauncestor against her.

Gloucest. cap. 6. All the heirs, whereof one is son or daughter, brother or sister, nephew or neece, and the other in a further degree shall joyn in a Mortdauncestor.

Gloucest. cap. 3. The heir shall have an Assise of Mortdauncestor, if Tenant by Courtesie alien and leave no assets.

An assise which may be either of his own, or his Ancestors possession, called an assise of Darrein presentment, is upon a disturbance when (*a*) himself or his Ancestor did last present; and therefore lieth for (*b*) Tenant in years, as well as for him that hath an Estate of Inheritance or for life.

(*a*) *F. N. B.* 31. *g. Old N. B.* 33.
(*b*) *F. N. B.* 31. *d* 5 *H.* 7. 16.

Statutes.

Magn. chart. cap. 13. An Assise of Darrein presentment shall be always taken

before the Justices of the Common Place.

F.N.B. 48. r. Marlb. cap. 12. and Westm. 2. cap. 2. A *Juris utrum* is such a real Plea founded upon the right for a Parson or Vicar upon his predecessors alienation.

Statutes.

14 E. 3. cap. 16. A *Juris utrum*, and other writs according to their case, given to Parsons, Vicars, and Wardens of Chappels, Provosts, Wardens, and Priests of perpetual Chauntries for Lands in Frankalmoign, as well as to Parsons of Churches or Prebends.

CHAP. XI.

Of a Writ of Partition, Nuper obiit, *and a* Quo jure.

This is the nature of an assise, and *Juris utrum*. Those that follow are either a *Partitione faciendâ*, *& nuper obiit* (which doth lie between privies in blood) or a *Quo jure*.

Lit. 53, 65, 72. A *Partitione faciendâ* lieth between Coparceners to compel partition to be made but not between Jointenants, or Tenants in Common, yet partition made there by assent between them is very good; but the husband

Lit. 98.

5 E. 3. part. 11.

husband of one of the Coparceners coming to be Tenant by Courtesie, such a writ lieth for the other Coparcener against him, because he cometh in of the state of his wife, but not for him, against the other. Therefore here is equality of partition, things that otherwise cannot, may be granted without Deed: As a Rent, Reversion, Seigniory, Way, Avowson, Compósition to present by turn, &c. 1 *H.* 7.5. 11 *H.* 4.5. 28 *H.* 6.2. 21 *E.* 3.7. 28 *H.* 8. *Dy.* 29.

Statutes.

31 H. 8. cap. 1. Jointenants or Tenants in Common of an Estate of Inheritance may be compelled to make partition, and afterwards shall have aid to deraign the warranty, paramount, and to recover for the rate as Coparceners (after partition) should.

32 H. 8. cap. 32. Jointenants, or Tenants in Common for life or years, or where one or many hold for life or years with another that hath the Inheritance, may be compelled to make partition. Such partition shall be prejudicial to none but the parties, their Executors and Assigns.

Niper obiit lieth against one privy in blood, that entreth after the death of the ancestor that died seized in Demesne. And therefore being but to try the pri- F. N. B. 197.

privity of blood, view, nor voucher, lieth not, neither is Non-tenure any plea.

F.N.B. 128. *Le Quare* lieth for the Tenant of the Land when one challengeth Common, there to try whether it right he ought to have any or no.

CHAP. XII.

Of Debt and Detinue, whereof a Writ of Annuity.

Thus far of real Actions. Personal action is that where dammages are to be recovered; for, at the Common Law neither shall (a) any but the Plaintiff recover dammages, (b) nor dammages lie but in personal and mixt actions, not in real, as Dower, writs of Entry, Sur Disseisin, Ayel, Cosinage &c. for in them dammages were given by special Statutes, which being but once suspended, or but against one, is gone for ever, and against all. As

(a) 22 H. 6. 27.
(b) Br. Costs 29

21 E. 4. 3. if the Creditor be made an Executor to his Debtor, and once administer, or take to wife one of the Executors of his Debtor, she having administred before, the action of Debt is gone for ever. So

11 H. 4. 83. 8 E. 4. 3. if two be bound in an Obligation to a feme sole, and after she taketh one of the Obligors to

21 E. 4. 23. 16 H. 7. 4. husband, the whole duty is extinct. Executors bringing an action, must do it

it in all their names, as well of those that refuse administration, as of the rest. But an action may be brought only against those that do administer. 32 H. 6. 25.

Statutes.

9 E. 3. c. 3. Stat. 1. In a writ of Debt brought against divers Executors, they shall have but one essoin before appearance, and one after appearance. He or they that do first appear in the Court at the grand distress, shall answer to the Plaintiff, and the Plaintiff (if it pass for) shall have judgment and execution of the goods of the Testator against all named in the writ, as well as if they had all pleaded.

In personal actions growing in respect of possession in Common Tenants in Common are in all respects as Jointenants; for they must joyn in an action of Tresspass, for a Tresspass done upon their ground: in an action of account against the Bailiff of a wood, and if one of them die, the survivor shall have an action of the whole. So if the Tenant for life, the reversion to two sisters commit waste, one sister dieth having issue, and the Tenant commit waste again, the issue and her aunt shall joyn in an action of waste, and the aunt sole recover treble dammages for the waste done in her sisters time. 22 H. 6. 12. 38 E. 3. 7. 45 E. 3. 3.

In personal *Præcipes* dammages only shall be recovered where the thing cannot be had: for dammages shall not be recovered 1 E. 5. 6.

vered in a writ of Detinue, if the thing it
Br. Detin. 48. ſelf may be delivered, dammages I ſay, to
the value of the thing demanded; but dammages for the detaining ſhall.

Perſonal *Præcipe quod reddat* are Debt and Detinue.

Debt, when any thing is due upon a Contract.

50 *E.*3.16. Which if it be money due from one to
11 *H.*7.5. another in their own right, is in the *Debet* and *Detinet*, otherwiſe in the *Detinet* only.
50 *E.*3. *ibid.* As in Debt, for the rent of Wheat, and Hens reſerved upon a Leaſe for years, or
19 *H.* 8.8. of any Chattel, quick or dead, in Debt by
10 *H.*7.5. or againſt an Executor for rent, upon a Leaſe of Land, though it be behind after
Ibid. the Teſtators death, or upon a former
15 *El. Pl.* 441. recovery of debt or dammages againſt Executors, or for Arrearages found in an Action of Account brought by them, for all is in the right of the Teſtator. But againſt an Heir upon an Obligation, &c. of his Anceſtor, it lieth in the *Debet* and *Detinet*, for the aſſets which he hath in his own right, maketh it his proper debt. So
47 *E.*3.33. for an Abbot or Prior upon an Obligation of the Predeceſſor, and though he be behind himſelf only, and againſt husband and
Ibid. wife upon a recovery of debt and dammages againſt the wife whilſt ſhe was ſole.

Statutes.

Magn. Chart. cap. 8. The pledges ſhall be

be free so long as the principal Debtor is sufficient. And answering the Debt, shall have the Lands and Rents of the principal till they be satisfied.

2 H. 2. cap. 12. No Warden of the Fleet shall suffer any Prisoner in Execution to go out of Prison by Mainprize, Bail, Bastion, without making agree to the party, unless by Writ, or other Commandment of the King, upon pain to lose his Office, and the party to have a writ of Debt against him.

33 H. 6. cap. 10. Every Obligation taken by a Sheriff or his Ministers, by colour of their Office, of any person in their Ward by course of Law, shall be by the Name of their Office, and upon Condition that the Prisoners appear at the day and place mentioned in the Writs, Bills and Warrants taken in any other form, it shall be void.

32 H. 8. c. 37. The Executors or Administrators of him that hath any Rent or Fee-farm in Fee-tail, or for life, shall have an Action of Debt for the Arrearages in the Testators life time against the Tenants that should then have paid it, or may distrein (and make avowry upon his matter) in the Lands, so long as they remain in the possession of the said Tenant, or of any claiming only from him.

A husband seized of any such Estate in any Rent or Fee-farm in his wives right, shall (after her death) himself, his Executors or Administrators, have the same remedy for Arrearages due in her life.

So of him, his Executors and Administrators, that hath a Rent or Fee-farm during another's life, and *cestui qui vi*, die, the same being unpaid.

Prerogative.

10 *El. Pl.* 321 When any of the King's goods come into a subjects hands, whether by matter of Record or Estate, so as he is accomptant for them, his Land all times after is chargeable for the same, and subject to the King's seizure, into whose hands soever it come, whether by descent, purchase, or otherwise.

Statutes.

34 H. 8. c. 2. The Land of the heirs of high Collectors of any Task, Subsidy, or Lone, and of the Receivers of Courts, shall be chargeable therewith, as well that the heir hath by descent in Fee-tail as in Fee-simple. And also that that is given him by the Collector or Receiver covenously, and thereupon the heir may have an action of debt against the Executors and Administrators of his Ancestor, wherein no Essoin, protection, or wager of Law is allowable, and have Execution of the goods of

of the Anceſtor, being in their hands at the time of the actions brought.

13. Eliz. c. 4. The Lands, Profits, and Hereditaments of every Accomptant, or of him that receiveth money for the Queen, or her Succeſſors, to be imployed to the uſe of the Queen, ſhall be extended (in the nature of a Statute Staple) for the payment of the Arrearages. Or the Queen, if he do not ſatisfie within ſix months after the Arrearage found, may ſell his Land, and the party may have the ſurpluſage to be delivered unto him by him that received the money upon the ſale, without further warrant; this ſale to be of any Land whereof it is found by inquiſition, that the Accomptant taketh the profits; which inquiſition, if it be not true, the party grieved after traverſe of the office, and that found for himſelf, ſhall have his Land again without any petition, livery, or ouſter lemain. If any ſuch buy Land with the Queens Treaſure, ſince the beginning of her Reign, and pay not the Arrearages as before, the Queen ſhall ſeize and retain the Land according to the rate that the party had it. This ſale extendeth not to thoſe Officers that have uſed to diſburſe the Arrearages about their charge, or offices which continue, except the Queen command preſent payment to be made, and then they ſhall have ſix months as before.

This Statute extendeth not to the Accomptants

compeants, whose yearly Rent, or whole Receipt from the beginning, exceedeth not CCC l. nor to Sheriffs, Escheators, Bailiffs of Liberties. Also the Sureties shall be ratable according to their abilities, charged for the surplusage only which remains not satisfied by such sale of the Lands of such Officers.

39 *Eliz.* c. 7. The former Statute of 13 *Eliz.* shall extend to sales to be made after the death of the Accompeant or Debtor, and to an Accompt made, or Debt known within eight years after his death.

And none shall be taken a Debtor but such Officers and Accompeants (in this act mentioned) as upon their Accompts finished (all reasonable Petitions being allowed) shall remain Debtor upon the foot of the Accompt.

After one year after the Accompt made or known (all reasonable Petitions allowed) the Queen may by her Letters Patents sell so much as shall suffice to satisfie it, if any Land which he had at any time since 2 *April*, 13 *Eliz.* or which otherwise are to be sold by the intent of 13 *Eliz.* the overplus, if any be, shall be redelivered without Petition or Fee. Every such sale shall be as good as if the party himself had made it for money, or other valuable consideration by bargain and sale, deed enrolled, feoffment, or recovery with voucher, and shall barr the party and his heirs, and all claiming under him, after he shall

shall be debtor or person accomptable, and all whom he might have barred by any recovery, and all whose Lands are to be sold by the intent of 13 *El.* and shall be good against the Queen and her Successors, and all claiming under them for any charge or incumbrance to the Queen or her Successors by the party.

Provided, it shall not avoid any Lease by the Queen in other sort than it should at the Common Law, if the Queen were satisfied.

This Act and 13 *Eliz.* shall extend to under Collectors of Tenths and Subsidies of the Clergy, shall not impeach any assurance made before this Parliament, *bona fide*, nor any Lease of 21 years, or three lives, whereupon so much yearly Rent shall be reserved yearly paiable, as hath been within 21 years before, nor customary Estates made according to the custome.

And of this nature is a writ of annuity, which lieth for him that hath an annuity in Fee for life, or though it be but for years, be it money or other things, as clothes, bread, &c. and is in the *debet* for them all: that is to say, for any other thing as well as for money, not in the *detinet* contrary to an action of Debt, Detinue, when any thing is withholden, which is called *De catallis reddendis*: if it be for writings, it is called *De chartis reddendis*. *F.N.B.* 152. *a.* *F.N.B.* 152. *b.* *F.N.B.* 152. *a.* *Old.N.B.* 62. *Old N.B.* 65.

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CHAP.

CHAP. XIII.

Of an Action of Account, and an Action of Covenant.

PErsonal *Præcipes quod faciat* act as action of Account, and an action of Covenant.

An action of accompt which is to an accompt to be made: As if one be made a Bailiff of a Mannor, &c. then it is against him as Bailiff; if Receiver of his Rents, Debts, &c. then as Receiver: if both Bailiff and Receiver, then as Bailiff and Receiver. *FIN.B. 116. p.*

Statutes.

Marlb. c. 23. Attachment given in an Action of Accompt against Bailiffs that withdraw themselves, and have no Lands nor Tenements to be distreined by.

Westm. 2. c. 11. He to whom the Accompt is to be made, may assign Auditors to take it, who may immediately commit to the next Goal the Accomptant (being found in Arrearages) till he fully satisfie: whereupon the Accomptant finding himself grieved, may bring the matter by a *Scire facias* before the Barons of the Exchequer.

In

Prerogative.

The King may have it against Executors, and ſo can no other man. *Lit.* 118.

An action of covenant which is for a covenant; that is to ſay, an agreement by Deed to be holden.

CHAP. XIV.

Of Writs where the Peace is not broken.

Perſonal, *Si fecerit te ſecurum*, are of things done without force, or where force is coupled with it.

Of thoſe without force, ſome go not ſo far as breach of the Peace; others do break it.

Thoſe that break not the Peace are theſe that follow.

Rationabili parte bonorum, for the Wife and Children of one deceaſed to have their part of the goods.

Valore maritagij for gardein in Knights ſervice, when the heir at full age refuſeth to ſatisfie him for his marriage: And therefore there in the writ are no words of the heirs intruſion into the Land. *F.N.B.* 140. *f.*

A writ of forfeiture of marriage is to recover the double value againſt ſuch an heir marrying himſelf within age, without the Lords aſſent, and at full age putting out the Lord. *F.N.B.* 141. *g.*

Entru-

Entrusion of ward, when the heir of Land by Knights service entreth, and putteth out the Lord, whether during his non-age, or after his full age, if the Heir both intrude, and deny the value of the Land also, then this writ of Intrusion of Ward may be brought for both.

F.N.B. 140. *Ejectione custodiæ* for any Gardein by Knights service or Soccage, against a stranger, ejecting him of the Land or body of the Heir, or both.

F.N.B. 197. *Quare ejecit infra terminum* for Lesser for years, against the Feoffee in fee, or for life of his Lessor; for in such a case an *Ejectione firmæ* lieth not against the Feoffee Lessee for life, because he is not the person that doth oust him, but his Feoffor and therefore was this writ devised. And here the term it self shall be recovered, if be not past, as in an *Ejectione firmæ* that cometh after.

So is the Law now adjudged. Trespass upon the case of things done against the Peace; as Assumpsits for assumption to be performed, and such like and this lieth not against Executors.

38 H. 6. 9. Here, and in all other actions of Trespass upon the Case, the writ must comprehend all the matter of substance, and which is traversable as clearly as the count, unless it be the day, quantity of the Land, or such like.

CHAP.

CHAP. XV.

Of Treſpaſſes upon the Caſe, againſt the peace, deceit, and conſpiracy.

The other that break the Peace, but not vi, are called Treſpaſſes againſt the peace.

Such of this kind ſpecially are an action of Deceit and Conſpiracy in the nature of ſuch a Treſpaſs. An action of deceit is upon any deceit committed, where if it be upon a Non-ſummons in a plea of Land, whereby he loſeth the Land by default, or ſuch like, it muſt be brought during the life of the Summoners, but not when all the Summoners and Neighors be dead. 22 H. 6. 47.

In a writ of deceit the Plaintiff ſhall recover all that he hath loſt. As if it be brought upon a Recovery in a *Quare Impedit*, &c. then dammages: If in a Formedon, then the Land only, but no dammages, for he loſt none in the Formedon before. 33 H. 6. 10.

Conſpiracy in the nature of a Treſpaſs is upon conſpiring by many to prejudice a man wrongfully. As if men conſpire to endict one becauſe he arreſted not a Felon that paſſed by the Town of *M.* And thereby they cauſe him to be indicted & amerced in the Leet of *R.* and *F.* and to be F.N.B. 116.

taken and imprisoned for this Amerciament, till he be thereof acquitted in the Leet. Or if men affirm and say to one *A.* that he hath right to such Land, and procure him to sue *B.* Tenant of the Land, whereby *B.* is compelled to sell other of his Lands for defence of this. Or if men procure one to be endicted for hunting in a Park, whereby he is taken and imprisoned, and put to expences, till he have acquitted himself of this Trespass.

CHAP. XVI.

Of Trespass whereof Parco fracto, Rescous, *and* Ejectione firme.

Such are those without force; coupled with force is an action of Trespass, for a Trespass done, whether in Goods, or upon his Land; and so if it be of a bodily trespass, as Battery, &c. but in maim and rape it is called an Appeal. *F. N. B.* 239. *d.* *F. N. B.* 85. *f.* 86. *a.*

An action of Trespass brought in a Court Baron, whether by Plaint in the Court of a Mannor, Hundred, or County Court, or by writ in the County Court, must not suppose it to be done by force and arms; for *F. N. B.* 239. *d.* then a *Superseedeas* lieth, shewing that a plea of Trespass, *quare vi & armis*, shall not be holden in a lower Court than before the King

King or other Juſtices by his Commandment. And therefore no *Capias* lieth there, either in Proceſs or Execution, but in Courts of Record only. 3 H. 6. 54.

Statutes.

Marlb. cap. 38. A writ of Treſpaſs is given to the Succeſſors (in Religious Houſes) for goods taken away from the Predeceſſor, whether he commenced Action in his life, and died without Judgment, or though he commenced no Action.

And likewiſe to recover their own Seiſin againſt Intruders in time of Vacation, wherein dammages are alſo given.

Marlb. cap. 4. If the Lord diſtrein for his ſervices when none are due, yet he ſhall not be puniſhed by fine and ranſome, but only be amerced.

Weſtm. 1. cap. 20. Treſpaſſors in Parks and Ponds attainted at the Suit of the party, beſides making large amends according to the Treſpaſs and Fine, at the King's pleaſure, ſhall have three years Impriſonment, and find good ſurety not to commit the like Treſpaſs. And if he cannot find ſurety, he ſhall abjure the Realm. Being a Fugitive, and having no Land nor Tenement, whereby to be juſtified, he ſhall be proclaimed from County to County, and if he come not thereupon outlawed, if none do

ſue within a year and a day, the King ſhall have the Suit.

5 R. 2. cap. 7. None ſhall make entry into Lands or Tenements, but where entry is given by Law. And in ſuch caſe not with ſtrong hand, nor multitude of people, but in peaceable manner.

He that is convict of the contrary ſhall be impriſoned, and thereof ranſomed at the King's will.

15 Ric. 2. c. 2. At all times that ſuch forcible entries be made, and complaint thereof cometh to any Juſtice of Peace, he ſhall take ſufficient power of the County, and go to the place, and if he find any that hold ſuch place forcibly, after ſuch entry made, they ſhall be taken and put into the next Goal, there to abide, convict by the Record of the ſame Juſtice, till they have made fine and ranſome to the King.

8 H. 6. c. 9. The like for them that make ſuch forcible entry into Lands, or other poſſeſſions, or them hold forcibly.

And whether the parties be preſent or voided before the Juſtices coming, yet he ſhall inquire of the matter by the people of the ſame County in ſome convenient place, and ſhall cauſe the Tenements ſo entred or holden to be reſeiſed, and reſtore the party (ſo put out) into full poſſeſſion.

The party put out or diſſeiſed in this manner, ſhall recover treble dammages againſt the diſſeiſor, or any feoffee, coming in by fraud.

31 Eliz. c. 11. No restitution upon an indictment of forcible entry, or holding with force, shall be good, where the party hath been in quiet possession three whole years next before the indictment, and his estate not ended.

Skerton cap. 6. A Lay-man ravishing, or marrying a Ward within fourteen years of age, shall be imprisoned, besides loss of the value of the marriage.

Westm. 2. c. 35. One that hath no right, taking away the Ward, shall be imprisoned two years, though he restore the Child not married, or satisfie for his marriage. Not restoring him unmarried, or not be able to satisfie for his marriage (in case he have married him) he shall abjure the Realm, or have perpetual imprisonment. The form of the writ, both when the heir is in the same County, or carried into another, is there set down.

If the Defendant there come not upon the distress, he shall be outlawed.

The Plea shall proceed, though the heir die, if the Plaintiff die before the plea determined, &c. a resummons shall be against his Executors or Heirs (if the Executors have no Assets) to satisfie the value of the marriage.

Special actions of Trespass are these that follow. F. N. B. 100.

De parco fracto for taking a distress of beasts, & other things distrained for dam-

mage feſant, or for rent or ſervices behind, not of the Pownd, whether common Pownd, or other place that is a lawful Pownd, and whether he that ſo brake the Pownd be proprietor of the Beaſts, or no. And this lieth for him that diſtreined, not for him whoſe the Cloſe was, where one diſtreineth and putteth the Beaſts by licence into his Friends Cloſe; for it is not the Pownd of the owner of the Soil, but of him that did diſtrein, and the other ſhall have an Action of Treſpaſs, *Quare clauſum fregit.*

F.N.B. 101. *c.* *F.N.B.* 102. *f.* **Reſcous** for taking ſuch a diſtreſs away before it be impownded. And here the party muſt needs have poſſeſſion of the Beaſts or things ſo recuſſed; for if he be diſturbed before he do attach or diſtrein them, a writ of Reſcous lieth not, but an Action upon the Caſe.

F.N.B. 220. *b.* *F.N.B.* 220. *f.* *Ejectione firmæ* when Leſſee for years of Land is guſted, be it by the Leſſor, or a ſtranger, where the term it ſelf ſhall be recobered, if it be not paſt, as in a *Quare ejecit infra terminum* before.

CHAP. XVII.

Of Appeals that touch Life.

THeſe are the Common Pleas, an appeal that concerneth Life in the parties

ties private action, prosecuting also for the Crown in respect of a Felony, be it petty Treason, or other Felony whatsoever. But for high Treason no Appeal lieth. *Lit.* 116. 8 *El. Pl.* 476. 33 *H.* 8. *Dy.* 50. 33 *H.* 8. *D. Stamf.* 50.

Appeals of the death of a man are given to the Heir of the party slain, for the husband shall not have an Appeal of the death of his wife, but her son. So the eldest brother of the whole blood shall have the Appeal, and not the elder brother of half blood; but the elder of the whole blood shall. 7 *E.* 4. 15.

Statutes.

Glocest. cap. 9. An Appeal of the death of a man must be brought within the year.

Magna chart. cap. 33. A woman shall have none but only of the death of her husband.

2 *E.* 6. c. 24. Endictment or Appeal good in the County where he dies, though the poisoning or stroke were in another.

3 *H.* 7. cap. 1. One acquitted upon an Endictment of Murder or Manslaughter, or as Accessory, shall go at large till the year and day be passed, within which time no Appeal may be brought (if no Clergy be had before) and all advantages therein saved, as if the acquittal had not been.

So against the Accessories, though the Principal were attainted at such suit of the King.

CHAP. XVIII.

Of writs of right Patent.

Old N.B.12. A writ of right Patent.
F.N.B.85. Of Treſpaſs.
F.N.B.2.f. of a writ of right Patent.
F.N.B.86. Of Treſpaſs Viscontiel.
6 E. 4. 3.
35 H. 6. 5.

THus far of Original Writs; Commiſſional are thoſe which are not returnable, but determinable before the parties to whom they are directed; and are but in effect commiſſionary, or meer Commiſſions. Of the firſt ſort are thoſe that give authority to a Court Baron, to hold plea where the Suitors are the Judges, not the Sheriff or Steward. Theſe are a writ of right Patent, or a *Juſticies*. In both which the ſame courſe is holden, as in thoſe that went before, *viz.* pledges as before, count as in them, and the ſame both proceſs that is in the writs original of that nature. As in a writ of right Patent, a *Præcipe* in the nature of a grand *cape* and *petit cape*. Trial by battel, or grand Aſſiſe, &c. in Juſtice or Viceontiel, writs of Debt, Accompt, &c. Summons of Treſpaſs, &c. Attachment, but not a *Capias* in any caſe, for that lieth only in a Court of Record. Alſo many Actions of one nature may be joyned in one *Juſticies*, with ſeveral *Præcipes*.

(a) F.N.B.1.b
(b) F.N.B.30.
(c) 14 E.3. dr. 31.
(d) *Ibid.*

So in Plaints, Bills, &c.

A writ of right Patent is a writ for the (a) meer right of Tenements holden of a common perſon, as Land, (b) Avowſon, or Rent (c) ſervice: but not (d) Rent-charge, Rent-

Rent-seck, or a Common to be brought to the Lords Court of that Mannor. But if he hold no Court, or otherwise yield his Court to the King for that time, at the prayer either of the Tenant or Demandant, then it may be in the King's Court with this Clause, *Quia B. capitalis dominus nobis inde remisit curiam.* F.N.B.1.b. Old N. B.1. F.N.B.3.c. & 8.a.b. F.N.B.2.f.

And this must shew by what service the Land is holden. The writ remaineth always with the party himself. So doth no other writ original. If one privy in blood not past the third degree, enter after the death of the Ancestor that died in demesne not seized. As where a man letteth for life, and dieth in the life of the Lessee, having many Coheirs, and after that Lessee for life dieth, and one of the Coparceners entreth into all, or where the Ancestor is disseised and dieth, and one Coparcener entreth into all, there such a writ of right Patent, for the other Coparcener or for the elder brother, if the younger enter into all, is called a writ of right *De rationabili parte terræ.* And therein the grand Assise nor Battel shall not be joined for the privity of the blood; nor view nor voucher lieth: neither is Non-tenure any plea, for it is to try the privity of blood, as a *Nuper obiit* that went before. F.N.B.1.i. F.N.B.4. Old N.B. 10. F.N.B.9.b. Old N.B 10. Ibid. 8 El. F.N.B.9.b. It lieth alsowhere the Ancestor dieth seized. F.N.B.9.b. Old N B.10. F.N.B 9.g. Old N. B. 10. F.N.B.9.g. F.N.B. 9.n. F.N B.197.c.d 7 H 6.8.

A woman that hath received part of her Dower shall have a writ of right of Dowry Patent for the remnant, wherein the same things F.N.B.6.

things are to be observed that were in writ of Dower, *unde nihil habet* before.

CHAP. XIX.
Of Justices.

A Justicies is a Writ that giveth the County Court power to hold plea; and therefore is called a Vicontiel writ: Of this sort are,

F.N.B. 184.b. 1. An assise of petty Nusance is where a Mill, or such like, is levied to ones Nusance.

All of them are comprehended in these verses:

rica Ca gulum ges lendinum
Fab, fur, porta domus, vir, gur, mo,
murus ovile:
Et pons; traduntur hæc vicecomitibus.

F.N.B. 148. 2. For admeasurement of things, as admeasurement of Dower by the heir, when his gardein or himself endowed the wife in his nonage of more than she ought.

Ibid. But by this writ she shall have no new land assigned to her in Dower. But only there shall be taken from her so much of the land as amounteth above the third part of the land whereof she ought to be endowed.

F.N.B. 125. b. & d. Admeasurement of Pasture by a commoner whom another commoner wrongeth by putting in more beasts into the Common than he should, whether the Com-

Common be appendant or appurtenant, ſo it be to a certain number, wherein all the Commoners, as well thoſe that have not ſurcharged, as thoſe that have, and alſo the Plaintiff himſelf ſhall be admeaſured. But it lieth not for the Lord againſt his Tenants ſurcharging, for he may diſtrein the ſurplusage for dammage feaſant. And as ſome ſay, may have an Aſſiſe; for it is a diſturbance of the profit of his ſoil. Nor for the Tenant againſt his Lord ſurcharging, but he ſhall have an aſſiſe of common.

Statutes.

Weſtm. 2. cap. 7. A gardein may have a writ of admeaſurement of Dower, and the Heir alſo at full age, if the Gardein follow it faintly.

In writs of Admeaſurement both of Dower and Paſture after the great diſtreſs Proclamation ſhall be made two County days, whereupon if the party come, the plea ſhall proceed: if not, Admeaſurement ſhall be made in his default.

Weſtm 2 cap. 8. When the ſame party after admeaſurement another time ſurchargeth, a writ to enquire if that ſecond ſurcharge ſhall go out either judicial, if the former Admeaſurement were before the Juſtices, or otherwiſe original out of the Chancery. And the beaſts ſurcharging the paſture, or their value, ſhall be anſwered to the King.

3. A

F.N.B.77. a. 3. *Nativo habendo* for the Lord that hath an Inheritance in any villein, but not an eſtate for life or years; for this writ is in his nature a writ of right to recover the inheritance of his villein, when his villein departeth away from him. And here if the defendant plead that he is frank, the Sheriff cannot proceed.

F.N.B. 77. b.

F.N. B. 77. c.

Old N. B. 73. 4. *Rationalibus diviſis*, for that Lord whoſe Land or Waſte hath by little and little been encroached upon within time of memory until now, by a Lord whoſe Seigniory adjoyneth in another ville, againſt the Lord ſo encroaching. But if the encroachment be at once, whether now or before time, there an Aſſiſe of Novel Diſſeiſin lieth, and not this writ.

Ibid. 73. & 74.

F.N.B. 66. e. 5. *De homine replegiando*, for one impriſoned, or in priſon detained where he ſhould not. As being bailable, or claimed as a villein, or in ward, where indeed he is frank out of ward.

F.N.B. 66. f.

F.N.B. 67.

F.N.B. 68. d. 4 H. 6. 30. 6. A Replevin for goods or chattels diſtrained, which according to the nature of the plea miniſtred by the parties, groweth to be either a real or perſonal plea, as upon property claimed, then is it perſonal; if the Defendant avow the taking for Services or Rent behind, &c. then it becometh real, &c. and as ſtrong as a *Præcipe quod reddat*, inaſmuch as he is to have a return. And therefore he ſhall in that caſe have aid before any plea pleaded as in a

F.N.B. 70. a. b *Præcipe quod reddat*. And this may be both by

by writ and plaint in any Court-baron, as well as in the County Court. And being by plaint, though in the County Court, it shall not proceed if any thing touching the Free-hold come in question, as if the Defendant a vowing for dammage feasant, the Plaintiff justifieth by reason of Common of Pasture. F. N. B. 70. b.

Upon the pluries not served by the Sheriff, his power is determined, and the parties shall plead in Bank. 2 H. 7 6.

Statutes.

Marlb. cap. 21. The Sheriff may replevin beasts not only without, but within a liberty also, if the Bailiff of the liberty will not.

Westm. 2. cap. 2. The Sheriff or Bailiff shall take pledges of the Plaintiff, not only *de prosequendo* before they make deliverance of the Beasts, but of returning of the Beasts, if a return be adjudged, he that taketh pledge otherwise shall answer the price of the Beasts. Upon a return awarded to the Defendant, the writ *De returno habendo* shall have this clause (that the Sheriff shall not deliver them without writ, wherein mention shall be made of the judgment.) And thereupon the Plaintiff (if he will) may have a judicial writ to the Sheriff to deliver him the Beasts.

Upon a return awarded, after which if a return another time be awarded, there shall be no more Replevin. And if upon his default the second time, or otherwise the De-

Defendant be adjudged to have a new turn, the distress shall remain irreplegable.

1 and 2 Ph. and Ma. cap. 12. Every Sheriff of a Shire (being no City) shall in his first County day, or within 2 months after receit of his Patent, proclaim in the Shire town four Deputies at the least dwelling not past 12 miles one from another, which in his name shall make Replevins as the Sheriff might do himself.

4 Deputies to make Replevins.

7 Many of the actions that went before, both for real things to be done, *Consuetudinibus & servitiis; Secta ad molendinum; Quod permittat; Mesne-dowe; Unde nihil habet.* And also personal Actions, as annuity, debt, detinue, accompt, covert, trespass, to what sum soever, may as well be brought in the County by Justices, as to be returnable in the Common place.

F.N.B 151: b. Ibid. 123. a. Ibid. 123. f. Ibid. 135. a. Ibid. 148. b. Ibid. 152. b. Ibid. 119. g. Ibid. 138. b. Ibid. 117. b. Ibid. 145. c. Ibid. 85. f. 86. g In ibid. 86 For they are as a Commission in effect. And the Sheriff may determine them by Enquest, according to the course of the Common Law.

CHAP. XX.
Of meer Commissions.

MEer Commissions are these that follow: being all of them to be directed to choice persons, such as it shall please the King.

Oyer and Terminer to hear and determine upon some heynous trespass committed; as rebellious Assemblies, Insurrection

F.N.B. 110. b.

Ibid.

Insurrections, and such like And these are called Justices of Oyer and Terminer.

Statutes.

1 E. 3. cap. 3. It shall be granted only to Justices of the one Bench or other, or to Justices errants.

In these and such like Commissions lye properly a Writ of Association, and *Si non omnes.*

Association is a Writ for other to be associate into their company, as fellow Justices together with them, and may be directed to the Justices themselves to admit them, or to the parties that shall be so associate to signifie their association. That (*a*) to the party is patent: The (*b*) other to the Justices to admit him is always close. *Si non omnes* is a writ for the rest to proceed, although the other come not. To be directed as well to the party to be associate as to the other Justices. Patent (*c*) to the party, close (*d*) to the Justices.

Ad quod damnum to enquire what hurt it may be to the King or Countrey, or any other for the King to grant such or such a thing, as a licence to alien in Mortmain, or to alien Lands holden of the King in chief; or to grant liberties to any City, or such like.

Perambulatione faciendâ to enquire of the bounds of two Seignuories or Towns, where an encrochment by little and little is supposed to have been made. And this must

F.N.B. 111. b.
(*a*) F.N.B. 111. d
F.N.B. 185. a. *in an assise.*
(*b*) F.N.B. 111. d
(*c*) F.N.B. 186. *ab.*
F.N.B. 111. a.
(*d*) F.N.B. 221.

Old N. B. 74.

must be by the mutual assent of both the Lords. But if such encroachment were at once, whether now or heretofore, a Assise of Novel Disseisin lieth, and not this writ.

CHAP. XXI.

Of Plaints.

SO far of writs; it followeth to speak of Plaints and Bills: both being in such Courts as hold plea without original writ.

A plaint is in matters that concern Common Pleas.

22 *Ass. pl.* 64. *Br. Jur.* 98. 14 *H.*8.15. *Ibid.*

A plaint of Trespass brought in a Court Baron, whether Mannor, Hundred, or County Court, shall not proceed if the Free-hold come in question: but a Suit by writ in the County Court may. Therefore in such case upon a plaint in a County Court, the party hath no remedy, but a writ of Trespass vicontiel, and thereby the Sheriff may determine the Issue, though the Free-hold come in debate. But that is no remedy in other Court Barons.

CHAP.

CHAP. XXII.

Of Bills.

A Bill is in Pleas of the Crown. Is an appeal of Felony, Maim, Rape, &c. may be by Bill before any one Coroner of the Shire, as well as by writ original, finding first sureties to the Sheriff. *Stamf.64.* *Stamf.55.a.* *Stamf.64.*

One whose attendance is necessary in any Court, as the Officers and Attornies there, shall sue and be sued in form of plaint without writ original, which is called a Bill priviledge. But albeit the Cook or Butler of a Judge, or other Officer of a Court shall have their priviledge if they be sued elsewhere, yet a Bill lieth not against them; but against the Officers and Attornies it doth, for they are Members of the Court, and their Attendance necessary. And they shall be fore-judged of their Office, if being demanded to do them, they make default. But an Attorney in the King's shall not be sued by Bill; for no Attorney is there of Record, nor his presence necessary: otherwise it is in the Common Place. *6 E. 4.3.*

CHAP. XXIII.

Of a Quo warranto.

Prerogative.

10 *H.* 7. 14. The King hath a special means of Suit for trying of the right of Franchise usurped upon him, called a *Quo warranto*; and is to be brought before the Justices of Oyer. Therefore here allowance of a Franchise, before them, bindeth the King. Otherwise it is upon a Suit in the Common Place.

Statutes.

Quo warranto in Justices Circuits.

18 E. 1. A Statute of *Quo warranto*. Pleas of *Quo warranto* from henceforth shall be pleaded and determined in the Circuits of the Justices.

18 E. 2. Stat. of *Quo warranto*. A publick *proclamari fac'*, shall be awarded to those that claim liberties, to know by what warrant they claim them, wherein they shall have a warning of forty days. The party that claimeth liberties being before the King, it shall not be in default before any Justices of their Circuits. And being impleaded before one or two Justices, the same Justice before whom he is impleaded, shall save him harmless before the other.

then if he come not at the day, the liberties shall be taken in the King's hands in name of a distress, and when they appear, be replevied upon their demand. In which replevins they shall answer immediately.

If their Ancestors died seized, then the King shall have a summons for them to appear before the King, or his Justices of Assise; at which day if they come not, nor be assoyned before the King, and the King do tarry longer in the same Shire, such order shall be taken as in the circuits of the Justices. And if the King depart from the same Shire, they shall be adjourned unto short days, and have reasonable delays according to the discretion of the Justices, as it is used in personal Actions.

CHAP. XXIV.

Of Offices for the King.

These are the Suits that every one may take. Enquiry for the King is, when matter for the King is found by a Jury called an Enquest of Office, whether the Enquiry be by Officers themselves, as Sheriffs, Escheators, Coroners, &c. *virtute officii*, or *virtute brevis*, or Commissions to them directed. But here the just number of twelve is not of necessity requisite, but may be sometimes more or less. F. N. B. 170. c.

21 E. 3. 2. An Enquiry is an office or presentment. An office which findeth matter to entitle the King to some possession; for an office is a title for the King, but finding but for a common person, it is but an evidence.

3 H. 7. 3. If such an office be found for heriditaments, and the King entitled by matter in *fait*, that is to say, by no other Record but that only; as if the office find that *J. S.* the Kings Tenant died seized, the party may either traverse, to say *J. S.* was not seized, or confess and avoid it by saying that himself was the King's Tenant; and disseised by *J. S.* and so *J. S.* died seized, being in by disseisin, &c. and this is called a *monstrans de droit*. But if the office entitle the King by matter of Record, as that *J. S.* was attainted of Treason, and seized of certain Lands, there only a Petition lieth to the King, because this is a double matter of Record, and therefore neither can the party traverse it by denying *J. S.* to be so seized, nor have his *monstrans de droit* to shew that *J. S.* did disseise him, &c. or that he enfeoffed *J. S.* upon condition, and that *J. S.* brake the condition before the attainder. All this is to be understood so long as the Record of the attainder continueth in his force. But the party may traverse the attainder well enough, as to say, 4 H. 7. 7. *nul tiel attainder*, i. that there is no such attainder, and upon that being found for him, he shall have the land, without being driven to his petition, other-

otherwise not; and the reason is, because the office entitling the King by a matter of Record, this title cannot be avoided, but by as high a matter, and not by the plea or allegation of the party; upon as high a matter of Record to avoid the office, as the office it self, a man may traverse it, though the King be intitled by double matter of record. As being found by office that *J. S.* was attainted of Treason by Parliament, and his Lands forfeit; and that he was seized of *B.* acre, whereby the King seizeth it. Now if another Act of Parliament restore the heir to all the Lands whereof the ancestor was seized, & adnul the ancestors attainder, his heir shall have this by way of plea, without petition.

If the office be for personal goods, the party may always have a traverse or plea any matter unto it; and so have his goods again, unless the escheator have accompted for them. And that though the office find the King's title to be by matter of record: as that *J. S.* was attainted of Felony or Treason, or outlawed in Debt or Trespass, and was at the time possessed of a horse, or of such and such goods, wherein in truth the property was unto a stranger; that stranger may have a Traverse. The King upon office finding for him, if his entry be lawful, and the possessions to be had at the time, is presently in possession, as in wardship or escheat of land found by office: but an office finding that the

4 *E.* 4. 24

Ibid.

34 *H.* 6. 5.

4 *E.* 4. *ibid.*

14 *H.* 7. 23, 25.

Stamf. Prer. 54 King's tenant hath ceased, or his Tenant for life committed waste, vesteth no possession in the King, for his entry is not lawful, but he is driven to sue a *Scire facias*. So if an office entitling the King to things not mentioned in to say, whereof no profit is to be taken forthwith, until they fall, as a Rent-common, &c. this vesteth no possession till the day. Also he shall be answered of all the mean profits from the time of his title. As upon an alienation in Mortmain found by office, from the time of this alienation appearing of record upon the King's Letters Patents adnulled for insufficiency from the very time of the grant.

14 *E.* 3. 11.
11 *H.* 4. 5.

4 *E.* 4. 24.
2 *H.* 4. 5. An Escheator here may find offices *ex officio*, as well as *virtute brevis*, or *commissionis*. But not of Outlawry of Felony, or such high matter of record without warrant paramount, and certification by writ of Record. Those *virtute brevis*, or *commissionis* are returnable in the Chancery. The other properly, in the Exchequer; but may also be returned into the Chancery.

Statutes.

36 *E.* 3. cap. 13. Stat. 1. No Escheator shall take Enquests of Office but indented between the Jurors and himself they are void.

38 *E.* 3. 1. cap. 22. See *virtute officii* only to find an office of Lands holden of the King of 7 l. value or above, pain 7 l.

§ B.

3 H. 6. c. 16. Take Enqueſts but of people impannelled by the Sheriff, and thoſe Enqueſts muſt be returned within a month after the taking. Pain 20 l. So of Commiſſioners.

15 H. 6. cap. 17. Take enqueſt *virtute brevis*, but within a month after delivery of the writ, his fees are ſet down.

1 H. 8. c. 8. Made perpetual. 3 H. 8. c. 2. Sit unleſs he have Lands, &c. to the clear yearly value of 40 Marks. Pain 20 l.

Delay to take the Verdict when the Jury offer it, Pain C l. So of Commiſſioners.

Be Eſcheator in three years again after that year ended.

34 E. 3. cap. 13. Stat. 1. A Traverſe given to the party whoſe Lands are ſeized by office for alienation without licence, or nonage of the heir in Ward, it ſhall be ſent to the Kings Bench to be tried.

36 E. 3. cap. 13. Stat. 1. Upon a Traverſe or *Monſtrans de droit*, the Chancellor may let him (that tendreth it) the Lands holden to farm, finding ſurety to do no waſte.

8 H. 6. cap. 16. They ſhall not be let to farm till the Enqueſts returned, nor in a month after, within which time the party grieved may have the benefit of the former Statute.

All Letters Patents within the month shall be void.

18 H. 6. cap. 6. All Letters Patents made of Lands or Tenements before office found or returned shall be void.

1 H. 8. cap. 16. The party shall have three months liberty after the office returned to tender his Traverse.

2 E. 6. c. 8. Where an office is found for the King, he that hath interest for years, or by Copy in the bond, or any Rent, Common, Office, Fee, or any Profits of whatsoever Estate out of the Land, shall have them, though they be not found in the Office in such sort as they should, if no office had been at all. When Land is found holden of the King immediately, and that it should descend or come to an heir within age, which is, or ought to be in the King's Ward, that heir within age may have a Traverse.

The party grieved may have a Traverse immediately or after at his pleasure, when one is found heir, where another indeed is heir, or when one is found heir in one County, & another found heir to the same person in another County, or when one untruly is found lunatick, ideot, or dead.

The party grieved may have traverse of *Monstrans de droit* (and shall not be driven to petition) when it is untruly found that one attainted of Treason, Felony, or *premunire* is seized of lands, whereunto another hath just title of an Estate of Free-

hold.

bold. And although the King be intitled in ſuch lands by double matter of record:

Upon every ſuch traverſe a *Scire facias* ſhall go out as in traverſes or petitions before, and the defendant therein have the ſame advantage that they had in a *Scire facias* in a petition before.

In every traverſe purſued by virtue of this act where by the Common Law the party were driven to petition, two writs of ſearch ſhall be granted. After judgment upon a traverſe ſued by virtue of this act, if it appear by matter of record that the King hath a former title, the ſame ſhall be ſaved unto him.

1 *Artic. ſuper chart.* c. 19. When the Eſcheator or Sheriff ſeize land into the King's hand without cauſe: upon ouſting of the King's hands, the party ſhall have the meſne iſſues reſtored to him.

20 E. *ſtat. De Eſcheatoribus.* If the Eſcheator by writ out of the Chancery ſeize Land into the King's hand, and after upon inquiſition no title is for the King to have the cuſtody; and *ouſter le main* ſhall be awarded for the party out of the Chancery.

Provided, that if any thing afterwards may be found in the Chancery, Exchequer, or Kings Bench for the King, a *Scire facias* ſhall go out againſt the party. And if the King have right, it ſhall be anſwered of all the iſſues from the time of the Eſcheators firſt ſeiſing of the Land.

23 H. 6. c. 17. In a *Scire facias* upon a Traverse against any Patentee no prescription allowable. Upon an office found
14 E 4.5. 6 H.7.15. *virtute officij*, whereby the King is intitled to ones wardship, the heir shall neither have livery, that is to say, the Land delivered out of the King's hands. But upon
Stauf. prer. 52 F.N.B. 235. c. a perfect office *virtute brevis*, or *commissionis*, if it be a special writ or commission, not a general one, to enquire of all wards he may. Therefore here the heir is allowed these Commissions following, or Writs in the nature of such Commissions, viz. First for the finding of an office for the King;
F.N.B. 252. then for the having of the Land out of the King's hand. Those for the finding of an office are; 1. A *Diem clausit extremum, Mandamus, & deveneruht*, to inquire what lands holden of the King, and what of other, the Ancestor was seized of the day of his death, the value, the day of his death, who
14 E. 4.6. is the next heir, and of what age.
F.N.B. 253. c. The *Diem clausit extremum* is to be sued within the year after his death.

Statutes.

14 E. 3. cap 12. Lands by ward in the Kings hand shall be let to the next friends of the Infant, to whom the Inheritance cannot descend, if they offer speedily after *Diem clausit extremum* in the Chancery to render till the Infants age, as other will without fraud.

The

The *Mandamus* after the year. And but it muſt further be inquired who took the profits. The *Devenerunt* is when the Anceſtor died in ward to the King. 2. *Quo plura. Melius inquirendum, & Datum eſt nobis intelligi*, upon defect in offices found by virtue of ſuch writs or commiſſions, but theſe ſhall never go out upon an office found *virtute officii*. *Quo plura* upon levying out of any land in thoſe offices.

Melius inquirendum upon any other defect in the office, as if the office were inſufficient or uncertain, or the Land of greater value than is found in the office; or held by other ſervices, or the Tenant ſeized of other eſtate.

Datum eſt nobis intelligi, upon an office finding lands to be holden of any other perſon, when there is a record to prove that it is holden of the King, but this writ ſhall not be upon a bare ſurmiſe.

Thoſe for having the Land out of the King's hand are an *Eſtate probanda*, and a writ of Livery. *Eſtate probanda* is to enquire whether he be of full age, or not, before which time he is not to have Livery. A writ of Livery is after a perfect office; (for no livery ſhall be upon an inſufficient office) finding a tenure in chief whether by Knights ſervice or ſoccage; & whether the heir then be within age, or of full age. But he that holdeth of the K. by Knights ſervice, but not in *Capite*, ſhall not ſue livery. But becauſe none can enter upon the King,

Stamf. 52. *F.N.B.* 253. *c.*
F.N.B. 253. *b.*
Stamf. ibid.
Fitz. ibid.
4 *E.* 4. 24.
F.N.B. 255.
E. 4. 24. *F.N.B.* 255.
2 *H.* 7. 2.
F.N.B. 157.
Stamf. prer. 52
F. N.B.
32 *H.* 8. *Br. livery & ouſter le main* 62.

King, the heir (if he were within age) when he cometh to his full age, shall have an *ouster le main*, to have all the Lands delivered to him at once by the King, which is called a livery, for if this be sued, and no mention made of an Avowson, all shall be reseized, and the King answered of all the mesne issues. And a livery must be entire, and not by parcels. The manner thereof is this, when the heir in the King's Ward is of full age, he shall have a writ out of the Chancery to the keeper of the Privy Seal, testifying that he is of full age, and hereupon he shall have a Privy Seal to the Chamberlain of the King to receive his homage. And when he hath received his homage, he shall have a writ from the Chamberlain to the Chancellor testifying that he hath received his homage, and thereupon he shall have a writ of livery.

44 E. 3. 25.

2 H. 7. 12. F. N. B. 156.

Statutes.

28 E. 3. c. 4. The rents given to them that sue livery when the rent-day cometh, how soon soever it come after the livery.

32 H. 8. c. 46. The Court of wards erected to be a Court of Record, Officers appointed: a Master of Wards that shall keep the Seal, an Attorney, a Receiver, two Auditors, two Clerks, a Messenger, and an Usher.

All wards with their Lands, &c. shall be in the ordering of the Court.

They may sell and grant the King wards, or

of their Lands during their minority, &c.

The same to pass by the King's Bill assigned, which shall be a sufficient warrant to the L. Chancellor for the great Seal.

They may (without the King's Bill assigned) make good sales of underwoods, and appoint timber for necessary reparations of the ward lands, and make Leases during their minority, &c.

Widows and the fines for their marriage are in the survey of this Court.

So are Ideots and their Lands, and the Court may let and set their Lands.

The grantee of the custody of wardship of any of the King's wards shall sue forth his Patent within four months next after the assignment of his Bill, else the Bill and effect thereof to be void.

Process shall be made out of this Court against wards intruding upon their lands before livery, or *ouster le main* under the Great Seal.

With many other matters concerning the authority of this Court, and the offices thereof.

33 H. 8. c. 22. The office of the M. of the livery united to the Court of Wards.

A Surveyor of the liveries added and appointed to be the second Officer.

A Clerk of the liveries also added.

All liveries suing shall be in the ordering of this Court.

None that hath land over the clear yearly value of 5 l. (otherwise it is where the Land

Land is under that value) shall have livery before inquisition or office, by the King's Writ or Commission, which shall not pass out of the Chancery or other Court, without a warrant directed to them out of the Court of Wards under their hand.

They shall set rates for liveries, and appoint days of payment, &c. and their bills for livery shall be a sufficient warrant to the Lord Chancellor.

A general livery may be sued where the yearly value of the land exceeds not 20*l.* but such general livery shall not be without warrant from this Court. The Patent for livery may be sued forth within three months next after the assignment of the Bill by the King or his Court.

1 *H.* 7. 28. If two being found heirs by one and the same title, whether twinlings that are males, found heirs by one self-same office, or divers men by several offices found heirs to the same Ancestor, and by the same title (for if one office find that the K. gave land to *A.* and the heirs of his body, and that *B.* is his cosin and heir, and another office findeth that the gift was in general tail, and that four daughters are his heirs, there must be a traverse and no enterpleading, for they claimed not by one ancestor and title) the King shall not make livery, till by enterpleader the truth is discussed at his full age that was found heir first: for if *A.* of five years is found heir to the K. Tenant, and after by another office

3 *E.* 4. 4.

office B. is found his heir, and of full age, B. hath no remedy till A. come of age, and then they must enter plead. And in every enterpleading, an office must be found for both. And if one be found heir of full age, and after another within age, the enterpleading shall not stay till the full age of the second, because the other was found heir first. Among Coparceners, the King upon livery shall make partition. And that is for the King's benefit, because upon that partition every one shall have some part of the lands in chief. For if any should have for their portion only the lands holden of other men, then the King should lose his prerogative in those lands for ever, because they that have them when they shall die, hold no Lands of the King in Capite. And therefore in the writs of Livery there is a proviso, that every one shall have in her purpart, parcel of the Lands holden in chief. *Stamf. prer. 8.*

CHAP. XXV.

Of Presentments or Endictments.

A Presentment is an enquiry, finding some offence against the King, which is also called an Endictment. Therefore it is as it were the King's Action, whereupon the party shall be arreigned, or put to answer by the King: and tried by another

ther Jury, which (in case of Felony or Treason) we call the Jury of Life and Death.

3 E. 1. Endict. 31.

Every strong suspicion of such an offence, though it be in case of Felony, **appearing of record, hath the force of an indictment:** as in an Action of Trespass of goods carried away, if the defendant plead not guilty, and be found guilty as a felon: 9 E. 4. 10. in an appeal of murder, &c. if the plaintiff after declaration be nonsuit. But so is not 2 E 3. 28. the Sheriffs return, as where he returneth upon one an Escape of Felony, &c.

7 E. 3. 324.

Without which the King can have no suit upon a wrong done principally to another; but done to himself he may.

(a) 12 H. 7. 18. *Constables and Borsholders are Conservators of the Peace at the Common Law.*

For (a) **preventing of certain of these offences, that is to say, trespasses to the body and felonies, and committing them that offend to prison, till they may be indicted, and so duly punished,** as (b) to arrest him that maketh an affray, and send him to the next Goal, or upon reasonable cause (as if it be night time, or there be that would rescous him, &c). keeping him in the stocks till he can safely bring him to the Goal; or to arrest him till he find surety by Obligation; **every hundred hath his Constable; and every several tithing within the hundred hath his Borsholder.** The conservator of peace in an hundred is called a Constable, or High Constable; in a Tything, a Petty Constable, Borsholder, Headborough, Thirdborough, Borough-

(b) 22 E. 4. 35.

9 E. 4. 26.

Borough-head, Tything-man, or chief pledg.

Statutes.

1 E. 3. cap. 16. Stat. 1. For the better keeping and maintaining of the Peace, the King will, that in every County good men lawful, which be not maintainers of ill, or Barretors in the County, ſhall be aſſigned to keep the Peace.

18 E. 3. cap. 2. Stat. 2. Two or three of the beſt in reputation in the Counties ſhall be aſſigned keepers of the Peace by the Kings Commiſſion, and at what time need ſhall be, the ſame with other wiſe and learned in the Law ſhall be aſſigned by the Kings Commiſſion, to hear and determine Felonies and Treſpaſſes done in the ſame Counties.

34 E. 3. cap. 1. In every County of *England* ſhall be aſſigned for the ſafe keeping of the Peace a Lord, and with him three or four of the moſt worthy men in the County with ſome learned in the Law, and they ſhall have power to diſtrein evil doers, rietors and barettors, and to purſue, arreſt, take, and chaſtiſe them according to their treſpaſs and offence, and to do them to be impriſoned, and duly puniſhed according to the Law and Cuſtoms of the Realm, and according to that to them ſhall ſeem beſt by their diſcretions and good adviſe-

ments, and also to inform themselves, and to enquire of all those that have been pillers and robbers in the parties beyond sea, and be now come again, and go wandring, and will not labour as they were wont in times past. And to take and arrest all those that they may find by indictment, or by suspition, and to put them in prison, and to take of all them that be not of good fame (whereſoever they shall be found) sufficient surety and mainprise for their good abearing towards the King, and towards his people, and to punish the other duly, to the intent that the people be not by such Riotors troubled and endamaged, nor the peace blemished, nor Merchants, nor other passing by the high ways of the Realm, disturbed, nor put in fear by the peril which might happen to them by such evil doers. And also to hear and determine at the Kings suits all manner of felonies and trespasses done in the same County, according to the Laws and Customs aforesaid.

13 **Ric. 2. cap. 7.** They must be sworn to keep and put in execution all the Statutes and Ordinances touching their Offices.

2 **H. 5. ca. 4. Stat. 1.** The Justices of Peace must make their Sessions four times by the year, that is to say, in the first week after the feast of St. *Michael*, in the first week after the *Epiphany*: In the first week after the clause of *Easter*, and in the first

first week after the translation of St. *Thom.* the Martyr (which is the 7 *Julii*) and more often if need be. And that the same Justices hold their Sessions throughout the whole Realm of *England* in the same weeks, every year from henceforth.

2 H. 8. cap. 5. Justices of Peace from henceforth to be made in the Counties of *England*, shall be made of the most sufficient persons dwelling in the same Counties, by the advice of the Chancellor, and of the Kings Council, without taking other persons dwelling in forreign Countries, to occupy such office, except the Lords, and the Justices now named, and to be named by the King and his Council. And except also the Kings High Stewards of the Lands and Seigniories of the Dutchy of *Lancaster*, in the North and South parts, for the time being.

18 H. 6. cap. 11. None shall be assigned Justice of Peace, if he have not Lands to the value of 20*l.* by year. This extendeth not to Towns Corporate, Boroughs, &c. nor to persons learned in the Law.

1 Mar. cap. 8. No Sheriff shall exercise the office of a Justice of Peace by force of Commission, or otherwise, in the same County, during the time only that he exerciseth the Office of the Sheriffwick.

Any (a) man suspecting another of a Fe-

(a) 9 E. 4. 26.

(b) 9 E. 4. ib. lony committed, or but (b) intended, as where one lieth in wait to rob the people that pass by, and draweth his sword upon one, willing him to deliver his purse, &c.

(c) 20 E. 4. 6, (d) 1 E, 4. 4. may arrest him (c) so as thereupon he commit him to the Gaol, as (d) common voice and fame that he did the fact, or being present where a murder was done, and found with a sword drawn in his hand, or when a robbery was done, and found with some part of the goods, are just causes of suspicion. So if I would arrest one that hath robbed me. And I. S. say I shall not, this is good cause to suspect I. S. as accessary; and what is sufficient cause of suspition, and what not shall be tried by the Justices. But

(a) 9 E. 4. ib. (b) 11 E. 4. ib. (a) neither can any man arrest one for a Trespass, unless it be the Constable, nor for a Felony, except (b) himself suspect the party (though he doth it by the commandment of one that doth suspect him) and that the same Felony be indeed committed.

27 H. 8. 3. As if it be for robbery, the self-same thing must be stoln; for to say, that divers Bieves were stoln, and because he suspected I. S. to have stoln six Bieves, he did arrest him, is not good, without alledging expressly that those six Bieves were stoln.

With indictments of Trespass, information upon penal Statutes (such as inflict a pecuniary mulct or other penalty upon offenders) have a near affinity. Concerning which informations, these Sta-

Statutes following were made.

Statutes.

4 H. 7. cap. 20. Where a penal Statute giveth whole or part to whoſoever will ſue a covenous releaſe or recovery (except it be by action) tryed upon the point of the Writ ſhall not prejudice him that will ſue *bona fide*.

31 Eliz. cap. 5. All informations and indictments where the forfeiture is limited to the Queen only, muſt be brought within two years after the offence commited, when it is limited to the Queen, and any other that ſhall ſue within one year, or (in default thereof) for the Queen within two years, except Statutes of Tillage. All brought after the time ſhall be void: where a ſhorter time is limited in any penal Satute, the Suit muſt be brought within that time.

27 Eliz. cap. 11. Information for the Queen upon Statutes of Tillage, ſhall be brought within five years after the action accurred unto her.

31 Eliz. cap. 5. Every information except champerty buying of extortions and offences againſt.

1 Eliz. cap. 1. Againſt fore-ſtallers, &c. muſt be brought into the County where the

offence was indeed done. But officers of record using to pursue the informations by vertue of their Office may do as before.

31 **Eliz. cap. 5.** All suits for using unlawful, or not using lawful game, not having Bows or Arrows, using any Art or Mystery wherein he hath been brought up, shall be sued and prosecuted in the general quarter Sessions of Peace, or Assizes of the same County, or in the Leet within which the offence is committed, and not out of the same County.

29 **Eliz. cap. 5.** The Defendant in an information in the Kings Bench, Common Pleas, or Exchequer, where he is baylable or by leave of the Court may appear by Attorney, may the first day appear by Attorney of that Court, without putting in bail.

31 **Eliz. cap. 10.** This former Statute (29 **Eliz. cap. 5**) shall extend only to natural subjects and free denizons.

18 **Eliz. cap. 5. Made perpetual.**

27 **Eliz. cap. 10.** An Informer shall not compound or agree with the party before his answer, nor after his answer, but by the order and consent of the Court; if he delay his suit, or discontinue it, or be *non-suit*, or if the matter pass against him by verdict or judgment, then he shall render to the party

ty his Costs and Damages to be assessed by the Court.

In which act also many other disorders in common Informers are redressed.

Indictments of the death of a man are to be taken before the Coroners. So is it not of any other Felony, for the Stat. 4 *E.* 1. called *officium Coronatoris* setteth down the office of a Coroner to be so by the Common Law, and the whole order how he is to proceed in the inquiry. 35 *H.* 6. 27.

Statutes.

Artic. super chart. cap. 3. The Coroner of the Shire shall joyn with the Kings Coroner in inquiring of the death of a man within the Kings house.

33 H. 8. cap. 12. The Coroner of the Kings house shall inquire alone without the Coroner of the Shire, by a Jury of the Yeomen officers of the Kings officers.

CHAP. 26.

Of Original Process.

HItherto of the first matter of the suit, it followeth to speak of Original Process.

Original process is that process which is still the Defendant do appear.

Original process is single or mixt: Single, which is by the possessions only (land or goods) or only by the person.

That by the land is of two sorts. First summons and grand *cape* in a *præcipe quod reddat*.

The Summons is a warning of the tenant in his land, but not by his goods, or by a rent-service, rent-charge, rent-seck, nor a Common which he hath, for there the land is anothers by certain summoners, two at the least. The Summons upon an action brought against one as heir, must be in land that did descend, otherwise it is in any land.

13 E. 2. *Judg.* 170.

37 H. 6. 26.

If it be to recover the freehold of land it self, it must be in the same land else making default, he may at the grand *cape* wage his Law of non-summons. But if he appear, it makes no matter in what land he be summoned.

Old N. B. 177. 50 E. 3. 16.

A grand *cape* is a process to take the land into the Kings hands by the view of lawful men, called thereupon Veyors, as the other are Parnors, with a summons of the Tenant to answer (a) as well to his default, as to the demandants action, and therefore it is called a grand *Cape*. Therefore here the Tenant is suffered to save his default as to say, that he was not summoned according to the Law of the Land, and thereof is ready to do his law, or that he was in prison, or disturbed by water, &c.

(a) 38 H. 6. 33 *Old N. B. ibid.*

Rawl. Pre 84.

And the King shall have the land to his own

own uſe, the Sheriff being accountable of the iſſues thereof from the default, till judgment for the Demandant.

Statutes.

13 Eliz. cap. 3. Upon a Summons in a real action fourteen days before the return, a Proclamation of the Summons ſhall be on a Sunday immediately after Divine Service, at the door of the Pariſh Church where the land lieth, and returned with the names of the Summoners. And till that done, no *Grand cape* ſhall go out, but an *alias & pluries* as the caſe requireth.

If the Tenant be returned ſummoned, where indeed he was not, the Writ ſhall abate. 22 H. 6. 41.

Secondly, it is ſummons and re-ſummons, or other like ſummons in a mortdanceſtor, *Juris utrum*, and an aſſize of Darrein preſentment.

By the goods, as in aſſiſes of novel diſſeiſin and nuſance, where the original proceſs is a *Pone per vadios & ſalvos plegios*. A *Pone per vadios & ſalvos plegios* is a proceſs to attach the Defendant by certain of his (*a*) proper goods not borrowed, or in pledge unto him, being meer perſonal chattels, neither a (*b*) chattel real, as a ward, &c. nor (*c*) parcel of his free-hold as a clod of earth, &c. which he ſhall (*d*) forfeit if he appear not. (*e*) And the Sheriff may take thoſe goods with him, or leave them with the party at his pleaſure. But whither-

(*a*) 35 H. 6. Br. *Attachment* 20.
(*b*) 7 H. 6. 10.
(*c*) 27 H. 6. 2.
(*d*) 9 H. 7. 9.
(*e*) *ibid.*

whithersoever he do, the property is out of the party till he make default.

The original process by the person a *Capias* (which is process to impr him) then an *exigent* or solemn (a) dema at five several County Courts immi ately following one another: There (b) no *Allocato comitatu* lieth if a Coun holden after an *exigent* returned, and not appearing, judgment to be out of protection of the King and his Laws, wh we call outlawry. The judgment whe of is to be given by the Coroner in fifth County. For (c) at the Comm Law there is no Outlawry, but where Writ is *vi & armis*, as in Trespass, Con racy, Felony, &c. And the reason why it eth there, is, because they are acts found upon the sole tort of the Defendant. this is in main Felony and Treason.

(a) *Br. per. Stamf.* 15.

(b) 32 E. 3. *Exigent* 14.

(c) 35 H. 6. 6, *Br. Exigent* 24. 11 H. 7. 26.

Statutes.

1 H. 5 c. 5. In every original Writ actions, personals, appeals, and indictme in which the *Exigent* shall be awarded: the names of the Defendants in such Wri original appeals and indictments, addi ons shall be made of their estate and deg or mystery, and the Towns, Hamlets places, and the Counties whereof they w or be, in which they were or be convers Otherwise all Outlawries thereupon pr nounced shall be none. And before th

outlawries pronounced, the ſaid Writs and Indictments ſhall be abated by the exception of the party omitting the ſaid additions.

6 H. 6. c. 1. All *Exigends* and outlawries upon Indictments in the Kings Bench of Felony and Treaſon ſhall be void, if before the *Exigend*, awarded, a *Capias* be not directed to the Sheriff of the County whereof they be named in the indictment, having ſix weeks ſpace (or longer, by the diſcretion of the Juſtices) before the return.

8 H. 6. c. 10. In every indictment or appeal of treaſon, felony, or treſpaſs, after the firſt *Capias* returned; forthwith (before an *Exigend*) another *Capias* ſhall be awarded to the Sheriff of the County where the indictment is ſuppoſed to abide retornable before the ſame Juſtices, &c. containing the ſpace of three moneths (where the Counties be holden from moneth to moneth) of four moneths (where they be holden from ſix weeks to ſix weeks) by which *Capias* the Sheriff ſhall be commanded to take his body if it be found in his Bailiwick, if it be not found, then to make proclamation (for his appearance) in two Counties before the return of the Writ. Any *exigend* or outlawry otherwiſe pronounced ſhall be holden for none.

10 H. 6. c. 6. The like is to be obſerved when

when any ſuch indictment or appeal ta
before Juſtices of peace, or other h
power, ſhall be removed before the K
in his Bench, or elſewhere by *Certiorari*
otherwiſe.

6 H. 8. cap. 4. Upon every *exigent*
writ to make three Proclamations (retu
ble day of the return of the *exigent*, and
proclamations to be made, two in the
County Court, the third at the gen
Seſſions) ſhall go out to the Sheriff of ev
other County (*viz.* than that where
action is brought) where the Defendan
named to be, or late to have been, if
Kings Writ run there: otherwiſe to
County next adjoyning to that where h
ſo named. Being named late of *Lond*
Middleſex, the Writ of Proclamation
go out to every other County, where h
abiding, time of the *exigent* awarded. Ev
outlawry to the contrary ſhall be avoi
by plea.

27 E. 3. cap. 2. A writ of *Idemptit*
nominis given to thoſe whoſe lands, goo
or chattels be ſeiſed by any officer, ſur
fing them to be outlawed (where they
not) becauſe they bear ſuch names as th
that be oulawed, for default of good d
claration of the ſurname.

9 H. 6. cap. 4. Such an *Idemptitati no*
nis given to their Executors.

If the *Exigent* be returned not fully ſerved without any folly in the Plaintiff, as (*a*) where the Defendant after demand at two Counties rendreth himſelf in Court, and upon mainprize found, hath a *Superſedeas*, and yet appears not at the day. But otherwiſe it is upon a (*b*) *Superſedeas* by another perſon bearing the ſame name, or in caſe where no (*c*) more Counties but four can be holden between the delivery of the Writ to the Sheriff, and the return, for it is the Plaintiffs own folly in the firſt caſe to put no difference between their names, and in the ſecond to take ſo ſhort a time. Though it be in the (*d*) huſtings of *London* which are holden uncertainly, the Plaintiff bringing a new *exigent* which we call an *Exigent de novo* (*e*) before any other County holden, but elſe not, ſhall have the benefit of the former Counties. And therefore it is called an *exigent allocato Comitatu*, or *allocato huſtingo*, if it be in *London*, where their huſtings are as the County Courts.

(*a*) 22 E. 3. 11.

(*b*) 38 E. 3. 1.

(*c*) 14 E. 3. En. 17.

(*d*) 17 E. 3. 43.

(*e*) 22 E. 3. 11.

Outlawry diſableth him from ſuing any action. *Lit.* 43.

Statutes.

5 E. 3. cap. 12. In caſe where the Plaintiff hath recovered damages, and he againſt whom the damages be recovered, is outlawed at the K. ſuit, no charter of pardon ſhall be granted, except the Plaintiff be ſatisfied for his damages. When one is outlawed by proceſs

proceſs no ſuch Charter ſhall be gran-
ed, except he yield himſelf before the
Juſtices from whom the *exigend* iſſued, who
ſhall cauſe the party to be warned to ap-
pear before them at a day. Whereupon
the Plaintiff appear, they ſhall plead upon
the firſt original, as if no outlawry had
been. If the Plaintiff appear not (and the
warning be duly witneſſed) he that is out-
lawed ſhall be delivered by virtue of his
Charter.

31 Eliz. cap. 3. Upon every extent in
a perſonal action a writ of Proclamation
ſhall go out of the ſame Court to the Sheriff
of the County, where the Defendant at the
time of the *Exigend* ſhall be dwelling.
Whereupon three Proclamations ſhall be
made; one in open County Court, another
at the quarter Seſſions, the third one month
at the leaſt before the *Quint' exact* at the
door of the Pariſh Church where the Defen-
dant ſhall be dwelling at the time of the *exi-
gent*, upon a Sunday immediately after Di-
vine Service. All outlawries otherwiſe ſhall
be void.

But before reverſing of any ſuch outlaw-
ry in this reſpect, the Defendant ſhall put
in bail, not only to anſwer the Plaintiff in
a new action, but to ſatisfie the condemna-
tion, if the Plaintiff begin his ſuit within
two Terms.

Pro-

Prerogative.

By outlawry all his chattels, whether Real as a (a) term for years (and therefore there the King may ſeize the Land it ſelf, and plow and ſow, and occupy it as the termor might) wardſhip, &c. or perſonal, as ones (c) goods (the property whereof is preſently in the King, and he may have a detinue againſt every man that hath a poſſeſſion of them) profits (d) of land, wherein he hath a Free-hold or inheritance, viz. Rents, Corn, manurance of his Paſture (yet in this caſe he cannot, &c. ſeiſe the land it ſelf, nor occupy, plow, or ſow it, or grant it away. And if the party ſo out-lawed make a feoffment, this feoffment is good, and the King after that ſhall have the profits no more.) But not (a) a fornace, table fixed upon the land with poſts, boards, doors, windows, and ſuch like annexed to a Free-hold are forfeit to the King, not only thoſe in poſſeſſion, but even ſuch as he hath a right unto, as debts, (viz. (b) due by ſpecialty, but not (c) by a ſimple contract, for the reaſon *ſupra fol.*) matters in (d) account (e) goods taken away, &c. But not damages which he is to recover, as by reaſon of (f) treſpaſs done to his land (g) battery, falſe imprisonment, or ſuch like.

(a) 9 H 6. 20.
(c) 30 H. 6 20.
(d) 9 H. 6. 20.
(a) 20 H. 7. 13.
(b) 50 aſſ. pl. 1. 19 H. 6. 47.
(c) 16 E. 4. 4. 50 aſſ. pl. 1. 9 El. Dy. 262. 3 E. 3. Cor. 333. Contr. Stanf. 188. b.
(d) So aſſ. pl. 5. 28 E. 3. 92.
(e) Stanf. 188. b.
(f) 28 E. 3. 92.
(g) Stan. 188. b.

In caſe of mayme there muſt be three capias, two in felony, as ſtelth, robbery and burglary, one duly in the death of a man, be it murder or man-ſlaughter, and high Treaſon.

Stat.

Statutes.

25 E. 3. cap. 14. The second *Capias* in c
of Felony must be returned three weeks
22 *aspl.* 81. ter. In case of Felony and high Trea
they that tarry the *Exigent*, though th
they render themselves, forfeit their ch
tels.

Mixt, is that which is to say by h
goods, as for want of goods he may res
22 *H.* 6. 38. to his person. As first in all *Præcipe qu*
34 *H.* 6. 49. *faciat*, and other personal *præcipes*, and
personal *Si fecerit te securums*, not being
F. N. *Br.* 92. *g.* gainst the Peace, or likewise in all *Ju*
2 *H.* 4. 25. or vicontiel writs, the process is a Su
mons by the Defendants goods, an a
tachment or *Pone per vadios* and distr
infinite: Or if upon the Summons a
bil be returned, that is to say, that the p
21 *H.* 6. 56. ty hath nothing whereof to be summ
od, then a continual *Capias*.

Distress infinite is a process to distr
him continually after, till he do app
by certain of his goods, and profit of h
lands, or as we use to say, issues, which
loseth if he appear not.

Statutes.

Westm. 2. cap. 37. No distress shall
but by Bailiffs sworn and known.

Westm

weſtm. 2. cap. 39. the Plaintiff may aver that the Sheriff might have returned greater iſſues, and thereupon ſhall have a Judicial Writ to the Juſtice of aſſiſe to enquire of what and how great iſſues he might have anſwered from the day of the purchaſe of the writ to the day of the return, and the Sheriff ſhall be charged of the ſurpluſage not returned.

1 E. 3. cap. 5. The like averment of two ſmall iſſues returned given againſt the Bayliffs of Franchiſes, as well as the Sheriff.

Upon this diſtreſs muſt be returned iſſues the value of all his lands from the Teſt of the writ untill the day of the return. As if his land be worth 12 C. l. by the year, and a months ſpace between the Teſte and the return a C. l. iſſues muſt be returned upon him. 24 El. *Fairfaxts caſe in the common pleas.*

And with theſe iſſues whether in this caſe, or in any other caſe of a diſtreſs infinite, as after a *venire facias* to return Jurors &c. **the land is chargeable** into whoſe hand ſoever it come after. As if iſſues be returned upon Tenant in Tail, Tenant for life, or a man ſeiſed in the right of his wife, the land ſhall be charged after their death: or if an Abbot loſe his iſſues, and after be tranſlated and made a Biſhop, the ſucceſſor during his life ſhall be charged. And in this reſpect becauſe the land is charged, the beaſts of any ſtranger coming upon the ſame land may be diſtrained for the iſſues loſt. D. *Stud per. Br. iſſues* 23. 22 H. 6. 4. 5 H. 7. 1. *Br. diſt.* 41.

In such proces as these where an attachment or distres should go out, if the defendant be a beneficed Clerk he must be warned by his person, or land if he have any lay fee else, as if the Sheriff return *quod est Clericus Beneficatus non habet laicum feodum.* Proces shall go out to the ordinary, to make him appear by the issues of his benefice, which is called a *vexari facias Clericum.*

Br. exigent 72. It is error if he be outlawed. 26 H. 8. 7.

A *Capias* lieth not here against a Peer of the Realm. But against a Knight it lyeth, for a man may be a Knight that hath no free-hold: So cannot an Earl or Lord by common intendment. But if he have nothing in the County where he is sued, the party shall have an *Elegit sure estatum* in such a County where he hath assets.

F. N. B. 73. & 74.

In a replev. the County Court, be it by writ or plaint, if the goods be conveyed away, so as at the Tenants suit they cannot be restored. As if he that took them drive them to a Fortlet or Castle, or out of the County, &c. whereby the Sheriff return upon the *plurits* that they are essoyned, proces of withernam lyeth, which is for the plaintiff to have of the others goods the restitution of his own.

Statutes.

Westm. 1. cap. 17. The Sheriff or Bayliff may take the power of his County or Baylliwick, and beat down a Castle or [illegible] wher

where such beasts are enclosed, if he that took them will not make deliverance.

Secondly in Trespasses upon the case against the Peace and in all other Trespasses, whether it be a writ of Deceit or Trespas *vi*, or though it be a Writ from the King himself upon a contempt or breach of the Peace, as refusing to come at the King, being sent unto him with money to aid him in his War, and spoyling and wasting mens lands, goods, and chattels, and other unlawful acts doing, and so every contempt it is attachment: And if a *Capias* in these cases go out first, and the party be taken thereby, he shall be dismissed, because it should be by pledges, distress infinitt, and upon a *Nihil* returned, a *Capias*, as before.

Here for contempts a *Capias* lieth against Peers of the Realm, as for rescuing of one arrested by the course of the Law, &c. And that is in respect of their disturbance of the Law.

In actions of Trespass, with force, whether a common action or indictment of trespass, appeal of battery, or such like, after the attachment returned *nihil*, it is three *capias*, *viz.* a *capias alias* and *pluries*, and then process of outlawry.

Statutes.

Westm. 2. cap. 11. Process of outlawry given in an action of account.

25 E. 3. cap. 17. Such proceſs ſhall be made in a writ of debt and detinue of chattels, and taking of beaſts by writ of *capias*, and by proceſs of *Exigend* by the Sheriff, as is now uſed in a writ of accompt.

7 H. 5. cap. 1. In writs to be purchaſed againſt thoſe that forge or make untrue Charters or Minuments, and them proclaim or cauſe to be read, like proceſs ſhall be made by *capias* and *exigend*, as in Writs of Treſpaſs.

19 H. 7. cap. 9. Like proceſs given in actions upon the caſe ſued in the Kings Bench, and Common Pleas, as in actions of Treſpaſs and Debt.

23 H. 8. cap. 14. Like proceſs given in every Writ of anuity as in an action of Debt.

CHAP. 27.

Of Counts.

THus far of the beginning of a ſuit. The proceeding hath two parts, Count and Pleading (which two are but one in Pleading) or other mean acts.

11 H. 7. 22. A condition (annexed to an eſtate of free-hold) cannot be alledged in Count or pleading unleſs it be by deed: Be it perſonal

perſonal or real actions. But a condition knit to a leaſe for years, or grant of a wardſhip, or other chattel Real may. Yet the Jury upon the general iſſue (as *nul tort nul diſſeiſin* in an aſſiſe) may find it if they will. And thereby the party ſhall have advantage of it. 11 *H.* 7. *ibid.* *Lit.* 85.

Count is a larger declaration for the time, place, quantity of the land, and other ſuch things **of the ſubſtance of the original writ.** And therefore in a Formedon of four Acres and Count but of one, all the Writ ſhall abate, for it is not purſued. In an appeal of murder, he cannot declare that the Defendant traiterouſly killed him as he was going to ſuccour the King in his Wars with twenty men in his company, &c. for the Writ ſuppoſeth no Treaſon. 8 *E.* 4. 1. 45 *E.* 3. 25.

Statutes.

36 E. 3. cap. 15. Declarations ſhall be good enough if they have matter of ſubſtance, though the terms be not apt.

In real actions which are in the right (but not in meer poſſeſſory ones) **the Demandant muſt alledg the taking of the profits,** we call it eſplees, **in the declaration.** As in pleas of Land, the taking of the profits of the land as errable, meadow, and paſture, &c. if of a pond, then by taking the fiſh there, as Breams, &c. In a writ of right of advowſon, the eſplees ſhall be laid in his Clerks taking the great and ſmall tythes. 8 *E.* 3. 331. 26 *H.* 8. 3.

In an aſſiſe of an office as of a filizary, &c. ſeiſin ſhall be alledged by the taking of
2 *Mar. Dy.* 114. 4d. for making out a *capias*, or ſuch like.
13 *H.* 8. 16. In a *quod permittat*, by the taking of com-
19 *H.* 6. 32. mon by the mouth of his beaſts. In a *natura habendo*, eſplees ſhall be alledged in the villein, *viz.* in taxing him high and low at his pleaſure, in making his profit of him, to
Br. Eſplees 11. drive his Cattle, to carry away his dung,
21 *H.* 6. 22. and to do all other kind of villein ſervice, &c. But in a Writ of Eſcheat, in a Writ of right ſur diſclaimer, and ſuch like, which are founded upon the ſeigniory, and not upon any ſeiſin of the land it ſelf, no eſplees ſhall be alledged. And theſe eſplees where they are to be alledged, muſt be alledged in himſelf, if the action be brought of his own ſeiſin in his anceſtor, if it be brought of his anceſtors ſeiſin, where it cannot be brought but of the ſeiſin of ſome other, there it muſt be alledged in thoſe other. As
9 *H.* 6. 53. in a formedon en deſcender the eſplees ſhall
50 *E.* 3. 1. be alledged only in the donee. In a formedon en remainder for an eſtate tail, only in the particular Tenant to prove the eſtate tail executed. In a formedon en reverter, they muſt be alledged both in the Donor and the Donee, for there a fee-ſimple is demanded. In a leaſe for life the remainder in tail, and the leſſee for life, and he in the remainder in tail die, the iſſue in tail ſhall have formedon en deſcender, and make no mention of the Tenant for life. And therefore the eſplees ſhall be only alledg-

ed

get in tenant in Tail, otherwise it is in the like case of a reversion in tail granted.

Instead of Count, a plaint shall be made in assises of novel disseisin, and in writs of dower a demand.

CHAP. 28.

Of Pleading.

PLeading is the parties debating of the suit.

Every plea, as Barre, Replication, Rejoynder, Sur-rejoynder, &c. **must be offered to be proved true.** By saying in the plea, *Et hoc patro natus est verificare*, which we call an averment. But no averment need to be in avowry, for it is in lieu of a Count and Declaration. And the avowant is in a manner actor and Plaintiff, and to have a return. 7 *El. Ploy.* 343.

In advantage of a matter which cannot be pleaded, shall be saved by protesting not acknowledgeng it to be true, although matter pleaded pass against him. As if an infant bring an action of waste against his guardian, and appear by Attorney (which none should do but one of full age) if the guardian take his nonage by protestation, because he cannot plead it, it shall save him from all mischief. But in detinue brought by the Executor of A. the Defendant cannot take by protestation, that A. made not the 48 *E.* 3. 10. 4 *El. Plo.* 276.

Plaintiff his Executor, for that is the very ground of the ſute, and may be denied by anſwer, and iſſue joyned upon it. And a proteſtation is but a ſaving to the party that taketh it, from being concluded of ſome matter alledged againſt him, whereupon he cannot joyn iſſue.

Pleas are either of the defendant when he is firſt brought in to anſwer, or the mutual pleas of both. In a joynt action againſt two or more: as in (a) an action of debt. But otherwiſe it is a writ of (b) conſpiracy againſt two, for they are ſeveral wrongs, **one of them appearing ſhall not anſwer.** But muſt have *idem dies* **till the other come in to anſwer,** or (c) **the ſute be finiſhed againſt him.** As by death or outlawry in a perſonal action, debt, accomp, or ſuch like.

(a) 48 E. 3. 1.
(b) 1 H. 7. 25.
(c) 41 E. 3. 3.

An action by, or againſt an Infant as heir. as (d) a *formedon en deſcender* brought by him, or a writ of (e) error againſt him where his anceſtor recovered; but (f) not where he cometh in of his own wrong, **ſhall not proceed till his full age unleſs it be apparant that by proceeding he cannot be prejudiced.** As in (g) a *formedon en deſcender* by an infant, if the Tenant plead a warranty with aſſets againſt him, the parol ſhall demur, for if he traverſe the aſſets, he ſhould acknowledge the deed of warranty. But (h) if the Tenant plead a recovery in avoidance of the eſtate tail, the parol ſhall not demur; for there the Court ſhall plead

(d) 48 E. 3. 33.
(e) 9 H. 6. 46.
(f) *Age* 16.
(g) 48 E. 3. 33.
(h) 48 E. 3. *ib.*

plead for him. But (i) it shall not demur in a writ of entry *sur disseisin* by an infant, though the Tenant plead a matter *en fait*, as a Feoffment with warranty by the Ancestor of the Infant, for there the Infant claimeth of his own possession. And if an Infant and his Ancestor be Joynt-tenants in Fee, and the Infant surviveth in a *præcipe quod reddat* against the Infant he shall not have his age.

(i) 14 E. 2. 17. *Age* 18.

48 E. 3. 35.

Statutes.

Westm. 2. cap. 40. The Husbands heir called to warranty by the alience by a *Cui in vita* shall not have his age.

Glocest. cap. 2. An Infant holden out of his heritage after the death of his Father, cousin, Grandfather, or great Grandfather, in an action thereupon shall not have his age.

Westm. 1. cap. 46. In a writ of entry by the heir of the disseisee, the sute shall not stay for his nonage, no more shall it for the nonage of the heir of the desseisor, if the disseisee bring his assise, and before the assise pas the disseisor die. The like incorporations where the Lands go by succession. But in a writ of dower an Infant heir shall not have his age, (a) nor the heir of the vouchee, in a *Quod ei deforceat* upon a recovery in a writ of dower, for it is in the nature of the first Writ.

39 H. 6. 39.

(a) 44 E. 3. 42.

CHAP.

CHAP. 29.

Of Pleas to the Jurisdiction and Person.

The Defendants first pleas in dilatory, or to the action.

Dilatory, which are before any plea in bar.

12 H. 7. 3. When an action is brought against many, they must joyn in the plea if they plead these dilatories, for in a *præcipe quod reddat* one cannot demand the view, and the other pray in aid, nor one pray in aid of one man, and the other of another man.

Dilatory pleas are exceptions, or foreign Advantages.

Exceptions are such dilatories grounded upon the matter it self of the suit. And are in disability or abatement. Those in disability, are to the Jurisdiction or Person. Both which must be before the Count made.

Exception.

To the Jurisdiction when it is alledged that the Court ought not to hold plea of it.

3 H. 6. 40. *Lit.* 44. To the person, when it is alledged that the Plaintiff ought not to be answered, as if he be out-lawed, excommunicated, &c.

In which latter case the suit shall be put without day, only till he be absolved.

CHAP.

CHAP. 30.

Of Pleas in Abatement.

THose in abatem. are for any fault in the first matter of the sute, for which cause the Defendant may have oyer of any thing tendred by the Plaintiff, and not being parcel of the record, as of the Writ, Condition, &c.

Pleas in abatement are to the Count first, and then to the Writ, for after pleading to the (a) Count or to the (b) plaint in assise, a man may plead unto the Writ, but (c) not to the Count after Plea to the Writ, but (d) to the matter of the Count he may.

(a) 30 E. 3. 20.
(b) 4 E. 3. 166.
(c) 4 E. 134, 135.
(d) 24 E. 3. 47.

And among pleas to the writ, exceptions that arise upon the view of the writ are to be pleaded before those that are foreign, or *debors* the writ as *non tenure*, several tenancy, &c. 35. 3 E. 3. 70.

Pleas to the Count are for insufficiency, variance from the Writ, &c.

Pleas to the writ are for default of form, false Latin, &c.

By waging of Law of non summons in a *precipe quod reddat*, the writ shall abate. 22 H. 6. 41.

In assises of novel disseisin and nusance, in appeals of felony and *Juris utrum* the defendant may have many pleas, two three, or more in abatement. As that there is no such Town, Hamlet, or place known *Stam. 82 c. of an assise. F. N. B. So of a Juris utrum also.* 1 E. 4. 4.

by

by the name, &c. and if that be not found, then that no Tenant of the free-hold is named in the Writ, &c. So in an appeal of Felony, whether the ſame matters be of ſeveral natures (that is to ſay) one tryable by Record, the other by the Countrey, as that the appeal was purchaſed hanging another, and alſo that there is no ſuch Town, nor Hamlet, nor place known out of the Town and Hamlet as C. whence the Defendant is ſuppoſed: or all of one nature triable by the Countrey, as that his name is *William*, where he is named in the appeal *John*, and alſo that there is no ſuch Town, &c. or that the party whom he is ſuppoſed by the appeal to kill, was dead ſuch a day, which was two years before the appeal commenced. Or that the Plaintiff is a Baſtard, or being a woman which bringeth an appeal of the death of her Huſband, that they were never accoupled in lawful Matrimony.

22 E. 4. 38.

The writ abating for ſome cauſe that cannot be imputed to the Plaintiffs folly, as for (a) falſe Latine, non (b) ſummons of the Sheriff (c) Joyntenancy, and ſuch like; but not for non (d) tenure, or (e) naming one an Eſquire when he is a Knight, himſelf bringing another with ſpeed in the ſame Court againſt the ſame party, we call it a writ purchaſed by Journeys accompts, ſhall have all advantages of the former, for he ſhall recover (f) coſts for the firſt ſute: the (g) defendant being executor ſhall

(a) 38 E. 3. per 46 E. 3. 14.
(b) 46 E. 3. 14.
(c) 32 H. 6. 24.
(d) 33 H. 6. 3.
(e) 33 H. 6. ib.
(f) 9 E. 4. 5.
(g) 2 H. 4. 21.

shall be charged with the assets which he had day of the first Writ, (a) Being Tenant day of the first Writ, he shall not plead non tenure, being (b) sole Tenant then he shall not plead Joyntenancy, being (c) Joynt-tenant, then he shall not plead several Tenancy. But no Writ by Journeys accounts lyeth by, or against any other than the self-same parties, and in the same Court that the former was: for (d) if the Plaintiff in a several action die, his Executors cannot have an Action by Journeys accounts. And (e) if two coparceners bring a formedon, and one dyeth, the other as heir to her father may have a Writ of all by Journeys accounts. But as heir to her sister of her part she cannot. So if (f) the Tenant in the *præcipe* die upon a Writ of dower brought, or such like, no writ lieth by journeys accounts. But (g) upon the death of one of the Joynt-tenants in a *præcipe quod reddat*, where the other hath all by survivor it doth: Lastly, if an assise of fresh force be abated in the Franchise, a new assise by Journeys accounts, cannot be in the Guild-hall before the Justices of assise.

(a) 46 E. 3. 14.
(b) 41 E. 3. 4.
(c) 43 E. 3. 16.
(d) 4 E. 6. Br. *Journeys accom.* 23.
(e) 7 H. 6. 16. 23.
(f) 14 H. 4. pl. 7 H. 6. 34.
(g) 7 H. 6. 23.

CHAP.

CHAP. 31.

Of Oyer of the Writ or Bond, &c. view or prayer, voucher, garnishment, Interpleader to the Writ and Sanctuary.

Stat. weſt. 2. c. 48. from henceforth view ſhall not be granted, but where it is neceſſary, &c. ſheweth that it did lye in thoſe caſes at the Common Law. And this view muſt be demanded before any plea in bar, and may be after pleading to the Writ: for though one plead a plea that goeth to the action (as that the Plaintiff in a writ of dower is an alien) yet if he conclude to the Writ, he may have view after 3 H. 6. 55.

FOreign advantages are delates without exception to any thing. As in actions Oyer of the Writ, &c. In actions, view, and, prayer, and, voucher. View is in real actions of the thing demanded, or of the land whence it comes, when it is ſo neceſſary, as without the Defendant cannot well anſwer.

Statutes.

Weſt. 2. cap. 48. From henceforth ſhall not be granted, but in caſe where view is neceſſary, as if one loſe land by fault, and he that loſeth, moveth a Writ demand the ſame Land. And in caſe one by an exception dilatory abateth writ after the view, as by non tenure or naming of the Town, or ſuch like, if purchaſe another Writ in this caſe, and the caſe before mentioned, from henceforth the view ſhall not be granted if he had view in the firſt Writs. In a Writ of Dower the demand is of the Land that the Huſband alienated

alienated to the Tenant or his Ancestors, where the Tenant ought not to be ignorant what Land the Husband did alien unto him, or his Ancestors; though the Husband died not seised, yet from henceforth view shall not be granted. In a Writ of Entry also that is abated, because the Demandant misnamed the Entry; if he purchase another Writ of Entry, if the Tenant had view in the first Writ, he shall not have it in the second. In all Writs also where Lands be demanded by reason of a Lease made by the Demandant or his Ancestor, as that which he leased to him, being within age, not whole of mind, being in prison, and such like, view shall not be granted hereafter: but if the demise was made to his Ancestor, the view shall not lie as it hath done before.

Stat. *De visu terre & essoyne de servitio Domini Regis*: View shall not be granted in a Writ of Ward, in a Writ of Customs and Services, in a Writ of Advowson of a Church (but not in case where there be no more Churches than one in a Town, and all of one Saint) in a Writ of Dower, and in a Writ of *Nuper obiit*.

Aid Prayer is for Tenant for life, to request him that hath the inheritance, to help him plead. And therefore here the tenant himself remaineth always party, and is never out of Court: And this Aid Prayer is for the feebleness of his estate. 31 *E.* 3. *Joind. in aid* 10. 33 *H.* 6. 29.

So

So must an incumbent, the Patron and Ordinary. Else no recovery against him bindeth the ſucceſſor or them. And the is in reſpect of their intereſt to the Church, the Patron to preſent, and to have an ind*cavit* of the Tythes: the Ordinary to adm and to preſent by Lapſe. But upon Aid pra er it doth, though they make default, an ſes the action.

Statutes.

Weſtm. 2. cap. 3. He that is in the verſion ſhall be received in default of the Tenant for life. If judgment be given b reddition, or default, he in the reverſion ſhall have a writ of Entry after the death the Termor: ſo ſhall the heir where the Te nant was Tenant in Tail.

20 E. 1. *De Defenſionis Juris*, he in the verſion deſiring to be received before jud ment, ſhall find Surety (as the Court ſha allow) to anſwer the value of the iſſues the Tenants from the day of the receipt, i judgment, if it paſs for the Demandant.

13 R. 2. cap. 17. The like receipt ſha be for him in the reverſion upon the fir pleading of ſuch a Tenant, and he ſha plead in chief without delay. And th Judges by diſcretion ſhall give days grace between the Demandant and h that is received, without giving the co

mon day in a plea of Land, unleſs it be by the Demandants aſſent. Surety of the iſſue ſhall be found (as before (20 E. 1.) as well where the receipt is counterpleaded, as where it is granted.

Gloceſt. cap. 11. Tenant for years ſhall be received before Judgment rendred, to ſay that the action was by covin.

Weſtm. 2. c. 3. Receipt is given to the wife in her huſband, if he loſe her land by default, and the Tenant that recovered againſt her huſband muſt maintain his own right. 31 *E. 3. Joyn. et ayd.* 10. *F.N.B.* 134. *b.*

Voucher is the calling of one that ſhould warrant in to anſwer the Action. Therefore upon the vouchees entring into warranty, the Tenant is out of Court. And notwithſtanding a recovery in a *Warrantia Chartæ*, yet if he be afterwards impleaded in an action where voucher lyeth, he muſt vouch him againſt whom the recovery was, elſe he ſhall have no benefit of that recovery

Statutes.

Weſtm. 1. c. 39. In Mortdanceſtor *nuper obiit*, intruſion, or other ſuch like Writs in which land is demanded which ſhould defend, covert, remain, or eſcheat, after the death of any Anceſtor or otherwiſe, if the Tenant vouch, it's a good Counterplea to ſay that the Tenant or his Anceſtor was the firſt

that entred after the death of him of whose seisin he demands, unless the vouchee be ready, who if he vouch over, the Demandant shall have his counter-plea.

Also in a Writ of Entry in the degrees none shall vouch out of the line. Also in Writs of Right or of possession (as before) that is a good counter-plea, that the vouchee nor his Ancestor had never seisin of the land or any thing in the services by the hand of the Tenant, or his Ancestors from the time of the seisin whereof the Defendant declares till the Writ purchased, so that he might a Feoffment make unless the vouchee be present, who if he vouch over, the Demandant shall have his Counter-plea. But warranty of Charters lies in these cases.

20 E. 1. Stat. de vocat. ad warrant. This Counter-plea of voucher that the vouchee nor his Ancestors had never any thing, so as he could a Feoffment make with warranty shall be received, although the vouchee be ready to enter into warranty.

14 E. 3. cap. 18. If the Tenant vouch a dead man, the Demandant may aver he is dead, or there is none such.

F. N. B. 134. k. 22 H. 6. 22.

Westm. 2. cap. 6. If the vouchee counterplead the warranty, and it be found against him, he shall lose the land. Where the vouchee losing the Tenant shall recover in value

lar against him any hereditaments that he had at the time of the voucher. And therefore a voucher is in liew of an action where the original proceſs is *Somons ad warrantizandum* or (*a*) if one be vouched within age *a Somons ad habendum viſum* firſt: and being awarded of full age, then a *Somons ad warrantizandum*, if he be awarded within age the parol ſhall demur and a *Grande cape ad valentiam*. **If the ſummons** *ad warrantizandum* **or** *habendum viſum, alias*, and *pluries*, **be not ſerved, then a** *ſequatur ſub ſuo periculo* **is to go forth. And if the Tenant cannot get that ſerved, he loſeth his warranty.** Therefore it is *ſub periculo* of the Tenant. And if upon vouching of an heir the *Sequatur ſub ſuo periculo* be returned *nihil* in the land by deſcent, but that he was ſummoned in land that he had purchaſed, the Tenant loſeth his Warranty, for the ſummons muſt be in lands deſcended. But if the *Sequatur ſub ſuo periculo*, or the *Cape ad valentiam* be returned ſerved, there the Tenant ſhall recover in value.

(*a*) 45 E. 3 23. 14 H. 6. 2 Br. *Seq, ſub, &c.* 3. Old N. B. 199.

Old N. B. ibid.

13 E. 3. *Judgment* 117.

3 H. 7. 13. Br. *recov. non. vala* 40.

But in exchanges the hereditaments are liable from the very time of the Exchange.

In partition among coparceners, from the death of their Anceſtor. So as the wives dower whom he taketh before any voucher by reaſon of ſuch an (*a*) exchange, or whom a (*b*) co-parcener in gavel kind marrieth at any time, ſhall be defeated upon a recovery in value, or *pro rata*, for ſo is the reco-

(*a*) Park. 61. b. (*b*) Park. ibid.

very in value called in the case of Coparceners.

Prerogative.

15 H. 7. 10. The King shall not be vouched, but prayed in aid, of which in that case hath the force of a voucher. As if the King by his Letters Patents give Lands to one by this
9 H. 6. 4. word (*Dedi*) the Patentee shall have aid of him, because by the same word he might vouch a common person. And when one prayeth in aid of the King in liew of a voucher, the special cause must be entred, else he shall never have in value by Petition.

So of Coparceners.

And if two Parceners make partition, one
1 E. 3. 4. alienateth part of her purparty, the other is impleaded and prayeth in aid of her Coparcener, and they lose. In this case she shall recover according to the rate of the moiety which she lost, whether the other alienated before aid, prayer, or after.

F.N.B. 17. 8. c. In an assize of novel disseisin and nusance, voucher lyeth not, unless the vouchee be present in Court, and will by and by enter into Warranty.

He that is impleaded in any action wherein he may vouch and doth not, shall never have the benefit of a *Warrant of Chart.*

Advantages in certain personal actions are Garnishment and Enterpleader. Garnishment is upon a Writ of Detinue, when

when being alledged by the Defendant to have been upon a bailment by the Plaintiff, and another, or for another upon condition. As that if I. S. do such a thing the goods shall be delivered to him (for though the Plaintiff sole delivered the goods, and I. S. were a stranger, yet I. S. is to have advantage of the condition, and may have a writ of detinue) if not, then re-delivered to the Plaint. that other shall be brought in to shew whether by reason of that bailment which the Defendant so alledgeth both for the (a) place, (b) condition, (c) and matter of the bailment, viz. who bailed it, &c. from which the Garnishee cannot vary howsoever it agree or disagree with the Plaintiffs declaration, himself or the Plaintiff ought to have them, for garnishment is but to know whether the condition, &c. alledged by the Defendant were performed or not. And if they were delivered upon other condition than the Defendant alledgeth, the garnishee is at no mischief but the Defendant: for the garnishee may recover them by a writ of detinue, and the Defendant by his false plea, maketh himself chargeable both to the Plaintiff and to the garnishee. But if the Defendant affirm not any certain bailment for place, condition, matter, &c. as if the Plaintiff declare of a bailment upon certain conditions, &c. and shew which, and that he hath performed them, and the Defendant pray garnishment generally: there the garnishee may

14 E. 4. 2.

(a) 21 H. 6. 25.
(b) 40 E. 3. 1.
(c) 20 E. 4. 13.
40 E. 3. 11.
4 E. 3. ibid.

21 H. 6. 35.

vary from the bailment alledged by the Plaintiff, for the Defendant hath not affirmed the same.

Interpleader is when divers bringing several writs of (a) detinue, ward, (b) or (a) 33 H. 6. 25. Quare (c) Impedit against the same person 8 H. 6. 30. in the same County, and for the same (b) 3 H. 6. 44. thing, though (d) they vary in time and (c) 19 H. 6. 68. place of delivery (for the place is not ma- (d) 8 H. 6. 30. terial being all in one County) so as they vary not in the substance of their declaration, 33 H. 6. 25. as for to declare of a chest sealed, without alledging any deed in certain: and the other (e) 8 H. 6. ibid. to alledge a deed in certain. They (e) all shall interplead together, as much to say, 33 H. 6. ibid. the rest shall answer him that brought the 8 H. 6. ibid. first writ, and therefore shall have the same day given them, if the writs be returnable at several days. And the reason of interpleading in detinue is, because otherwise if one recover against the Defendant, yet the others action is not abated, but continueth still. Otherwise it is in a real action as in Formedon *præcipe quod reddat.*

Prerogative.

The King may appoint any place he thinketh good to be a safeguard for all offenders flying thither, that they shall not be molested or compelled to answer, whether one fly thither for (a) treason, (b) murder, theft, or other crime, for which he should lose life or member. And therefore this (a) 1 H. 7. 25. (b) Stamf. 11. The Abbot of Battail had so.

King

ting effect by the Kings grant only (for touching the Kings Prerogative ſo nigh it cannot (d) be by preſcription) and being an immunity to one that offendeth the King and his Crown, is a (e) temporal matter pertaining to the temporal Coertion and Juriſdiction, and need no conſecration. But yet when it is conſecrated by the Popes unholy Ceremonies, it obtaineth the name of Sanctuary.

(d) 1 H. 7. 26.

(e) 1 H. 7. 25.

Statutes.

Taking of Sanctuary away.

26 H. 8. cap. 17. In High Treaſon.

28 H. 8. cap. 7. In Petty Treaſon.

27 H. 8. cap. 4. and 28 H. 8. cap. 15. In Treaſons, Felonies, Robberies, and Confederacies, in or upon the Sea, or other Haven, River, Creek, or place where the Admiral hath or pretendeth Juriſdiction.

32 H. 8. cap. 4. In wilful Murder, Rape, Robbery, in or near the high way, or in any houſe, putting any perſon within in fear of his life, Felonies, burning of houſes or barns with Corn, robberies of Churches, Chappels, or hallowed places, and all procurors, and abettors, and all offences where Sanctuary lieth not by the Law, or is taken away by any former Statute.

32 H. 8. c. 12. In Treaſon, Miſpriſion

of treason Man-slaughter within any of the places or houses of the King, or his heirs, or where the King in person is abiding. So in stealing, or in feloniously carrying away any Plate, Jewel, or other goods of the King or his successors, above 12 *d.* value.

32 H. 8. c. 1. made perpetual, 23 H. 8. c. 3. 1. E. 6. c. 12. In Murder or Poysoning of malice prepensed, breaking of any house by day or night, any person being in it and put in fear thereby, robbing in or nigh the high-way, felonious stealing of Horses, Geldings or Mares, or stealing goods out of any Church or Chappel. But in all other cases of Felony it shall be granted.

2 E. 6. cap. 33. In felonious stealing of ones Horse, Gelding, or Mare.

1 Mar. cap. 6. In counterfeiting Coyne that is not the Coyn of the Realm, or currant in the Realm, the Queens sign manual, privy Signet, or privy Seal, and all procuring and abetting.

1 and 2 Ph. and Mar. cap. 4. From these that call themselves Ægyptians.

27 H. 8. cap. 19. All in sanctuary for Murder or Felony out of the house, wear a badg in length and breadth ten inches: they shall wear no weapon but their meat knives, and that at meal only.

Each

both theſe upon paln of loſs of the priviledg.

They ſhall not be out of their lodging before Sun riſing, nor after Sun ſet upon pain of imprisonment two days in that Sanctuary for the firſt time he is ſo taken, the ſecond time ſix days impriſonment, the third time loſs of his priviledge, upon ſubſtantial and indifferent proofs before the Lord Chancellor. And it is Felony for any Sanctuary perſon that ſhall of prepenſed malice make reſcues, or reſiſt any Officer in impriſoning the priviledged perſons as before. Contracts under 40 *s.* treſpaſs and covenant between the priviledged perſons, and other inhabitants in the Sanctuary ſhall be determined before the Governor.

32 H. 8. cap. 12. All Sanctuaries adnulled other than Churches and Church yards, and certain places named in that Act, and 33 H. 8. cap. 15. which are appointed places of Tuition, for term of life to the offenders in capital offences. The priviledged perſons ſhall every day be called by name, and making default three ſeveral days without lawful cauſe, forfeit the priviledg: committing any offence puniſhable by death is forfeiture alſo.

CHAP.

CHAP. 32.

Of Pleas in Bar.

THus far of Dilatory pleas.

Pleas to the action are those th
go to the body of the matter.

And are pleas in bar or confess
Pleas in bar are those which are to
the Plaintiff of his action where the
fendant must make defence, as to
Defendit vim & injuriam quando.
4 H. 6. 33. this defence shall not be in dower a
of novel disseisin, *Per quæ servicia*, and
taint.

The Tenant may plead a Warra
in bar of him that should warrant
Lit. 150. ding the action. As if there be Gra
ther, Father and son, the Grandfather
seised, the Father releaseth to the disse
with warranty, and dyeth after the Gr
father dyeth. Now if the Son bring an
on to recover the Land he shall be ba
by the warranty made by his Father,
this is called a Rebutter.

Statutes.

Glocest. cap. 3. The heir shall no
barred of his mothers inheritance by
warranty of the Father, being Tenant
courtesie, or alienating without fine in

mothers life time except he leave assets.

And though the Tenant of the Land be a stranger to the Warranty, as a disseisor or one that cometh in by a recovery, may plead that he hath a third persons estate, and (a) rebut, but not vouch by a Warranty made unto the person. But (b) Writs of Dower the Ancestors Warranty is no bar.

(a) 42 E. 19.
(b) 21 E. 4. 82. Lit. Chap. of Warranty.

A Warranty made by the disseisor at the time of the disseisin: we call it a warranty commencing by disseising. As the Feoffment with Warranty of a Father, or other Ancestor, lessee for years or at will of the demise of his son, or of guardein in Knights service or soccage, or where one which hath not right entreth into the Land, and presently maketh a Feoffment with Warranty, barreth not his heir (c) for then his action and right should be lost for ever. But by such a Warranty the heir may be vouched, for that is in the nature of a Covenant against him as Heir to his Ancestor. So that if he have other Land descended to him from the same Ancestor, it is reason that he Warrant that which he may do, saving to him his action that he may have by reason of the disseisin.

(c) 50 E. 3. 12.

In an assise of novel disseisin and trespass the defendant pleading a title in bar must give colour of title to the Plaintiff, for if either it be no title, as either in trespass to plead (a) it is his free-hold, or (b) the free-hold of I. S. and that he entred by his com-

(a) 22 H. 6. 50.
(b) 2 E. 4. 8.

(c) 15 H.7.10. commandment, or (c) when one prayeth aid of *J. S.* or of the King, or *Rege inconsulto*, though he intitle himself by a lease will, &c. colour needs not. Otherwise

(d) 21 E. 4. *ib.* (d) if he entitle another to a lease for

(e) 32 H. 6. 1. and justifie by his commandment. So

21 E. 4. & 5. a matter that destroyeth the Plaintiffs as a release in an assise, in a trespas goods a sale by a stranger in Market and that the Plaintiff took them out of possession, and he re-took them, there colour needs not.

No more it doth where he pleadeth the writ and not in bar, though the plea deed go in bar. As in trespas of goods *J. S.* was possessed and made *Alice S.* *J. D.* his Executors and dyed. *Alice S.* the Plaintiff to Husband, and was coverte of the trespas and after dyed. So should writ be brought by *J. D.* who is yet in life, not named in the writ, judgment the writ, &c.

And in giving colour these things must observed.

1. It must be to the Plaintiff, not

38 H. 6. 7. stranger, nor to the Defendant.

Not to a stranger, as in trespas that was seised and him enfeoffed, and *J. S.* ing by colour of a deed of feoffment from where nothing in truth passed, &c. and enfeoffed the Plaintiff. This is no colour, for in a stranger matters *en fait* always be alledged, as to say, that enfeoffed *A.* who enfeoffed the Plaintiff

that *A.* entred and diſſeiſed *J. S.* and enfeoffed the Plaintiff, &c.

Neither muſt the plaintiff give colour to the Defendant, as where the Defendant pleade h his freehold, now if the Plaintiff ay that before the Defendant any thing had, *A.* was ſeiſed and enfeoffed the Plaintiff, and he *D.* by claiming colour of a deed of feoffment from *A.* where nothing paſſed, &c. entred, upon whom the re-entred is not good. 19 *H.* 6. 31.

2. It muſt be of ſuch a poſſeſſion where- by he may maintain his action.

As in an aſſiſe the Defendant muſt give the Pl. a colour of the Pl. own poſſeſſion, and not of the poſſeſſion of his Anceſtor, as to ſay that the Plaintiff claiming by colour of a deed of Feoffment made unto himſelf where nothing paſſed, &c. is good. But not to ſay that the Plaintiff claiming by colour of a deed of Feoffment made to his Anceſtor where nothing paſſed, &c. for of ſuch a poſſeſſion in his Anceſtor he cannot have an aſſiſe. 32 *H.* 6. 6.

3. The colour muſt be a matter doubtful in Law, or otherwiſe difficult to the people, elſe it is not ſufferable, but he ſhall be forced to take the general iſſue, as in an aſſiſe to ſay, *Nul tort, &c.* or in action of Treſpaſs, not guilty. As if I bring an aſſiſe againſt you, and you ſay that you have the ſame land to one for term of life, and after granted the reverſion to me, and the Tenant for term of life dyed, and that I claiming the reverſion by force of the ſaid grant 19 *H.* 6. 21.

grant, where the Tenant did never attorn entred, &c. This especial matter is sufficable, because that is dangerous to plead *tort, &c.* For the lay-people will think that the reversion passeth by force of the grant without attornment. The same Law it is where the Tenant saith, that he himself let the land to the Plaintiff for term of his life, and then the Plaintiff did surrender: For the lay-people know not that a surrender may pass by word. The same Law it is where the Tenant saith, that the Father of the Plaintiff let unto him for term of another mans life, and after released unto him. And the Plaintiff supposing that his Father dyed seised of the Reversion ousted him after the death of him, for whose life, &c. because the lay-people understand not how this release doth inure, whether by way enlargment, feoffment, confirmation, or extinguishment. The same Law it is if the Tenant say that the Father of the Plaintiff enfeoffed him, and afterwards suffered him to occupy at will, and he supposing, &c. The same Law it is to say, that the Plaintiff claiming as Bastard and eldest son entred, because the lay-people think that the eldest Son, though he be a Bastard may inherit. The same Law it is to say that such a one was seised and infeoffed, the Tenant and the Plaintiff claiming by a Descent feoffment made before where nothing passed, &c. because the lay-people think a good feoffment, though it be made

without livery. But where the special matter is not a matter in Law, or difficult, there the Tenant or Defendant must take the general issue, as if the Tenant say, that he was seised untill he was by the Plaintiff disseised, whereupon he re-entred, this Plea is not sufferable, because all men know that the Tenant in this case is no disseisor, or otherwise if he say, that the Plaintiff claims as younger son, because that every man knoweth, that the younger son cannot inherit before the elder. The same Law it is if he say, that he leased to the Father of the Plaintiff for term of life or years, or for term of another mans life, and the Plaintiff supposing that he had died seised of an estate in fee-simple, entred, &c. because in these cases the Lay people do well understand that he is no disseisor: and therefore in these, and in all other like, the Tenant shall take the general issue.

In real actions for the meer right when it is in respect of a disseisin done to him or his Ancestors, and not founded upon a Seigniory, as a Writ of Eschete, a Writ of Right sur disclaimer, &c. the Tenant cannot traverse the seisin, but may tender a Mark to the King to have it inquired by the Jury: and being found that the Demandant was not seised in the time whereof he counteth, that shall bar him for ever. 16 E. 4. 9. 3 E. 3. Dr. 26.

Prerogative

Prerogative.

The Tenant cannot tender half a mark against the King.

The Heir or Executors in an Action brought against them, where they are chargeable, pleading a matter in their own knowledge (a) which goeth in perpetual bar. As for the heir to plead that no thing descended to him from the same Ancestor; the Executor to plead a release or acquittance made unto himself, or that he was never Executor, nor never Administrator as Executor shall be charged as in their proper duty, if it pass against them. Otherwise it is if the Executor plead *Mainmer*, or another Executor alive not named in the Writ (for that is no bar, but only to the Writ,) or *Oriens inter mains* (for that is no perpetual bar, for a *Scire facias* lyeth if they come to have Lands after) or a release or acquittance to their Testator: or *Nient fait* of their testator, for they cannot have knowledge of it. Otherwise it is also if either the Heir or Executor be condemned by a *Nihil dicit*, or confess the certainty of the assets. And in the first case, as where the heir pleadeth nothing by descent, &c. which is found against him, the Plaintiff shall have an *Elegit* of the moiety of all his lands, as well purchased, as by descent: and in a *Formedon en Descender*, if the Tenant plead in bar a warranty with assets, and the Demandant said *Rien per descent*, &c.

(a) 3 & 4. P. & M. Dy. 149. 21 E. 3. 9. 6. & 7. E. 6. Dy. 81. 34. H. 6. 22 Br. Exec. 22.

6 & 7 E. 6. Dy. 81. *where the heir is condemned by a Nihil dicit, execution shall be of lands descended by a special Elegit, not of his goods, &c. nor no Cap. ad satisfaciendum lyeth against him.* 21. E. 3. *ibid.*

it is found that he hath by deſcent, he ſhall be barred of all that he demandeth by his Writ (of how ſmall value that be which deſcendeth) becauſe the iſſue that he tendred is falſe.

In Aſſiſes of Novel Diſſeiſin, Nuſance, Mordanceſter, *Juris utrum*, **and in Indictments and Appeals of Felony, the Defendant may plead in abatement, and over in bar, or take the general iſſue alſo.**

As in a Mortdanceſter, *(a)* that he hath nothing but in right of his wife; or *(b)* *J. S.* holdeth parcel of the Land in demand, not named in the Writ: and if that be found againſt him, then that he hath abated. In an aſſiſe of Joyntenancy, or Miſnomer, which are in abatement or any matter in bar: (unleſs he confeſs a putting out of the Tenant, or that which amounts to as much, as by pleading a releaſe, or ſuch like) and if that be not found, then he hath done no wrong. In a *Juris utrum*, the Tenant may plead Miſnomer of the Demandant, or that a ſtranger holdeth parcel not named. And if it be found, &c. that the Demandant hath received his fealty, &c. And if it be found, &c. then that it is his Lay fee, and not Frank Almoign, &c. In an Indictment, or appeal of death, Miſnomer of himſelf, or no ſuch Town; and to the Felony not guilty. But he cannot plead a Releaſe and to the Felony not guilty: for by the Releaſe he hath in a manner confeſt the felony: alſo he may plead a matter in bar, and upon

(a) 4 E. 3 29.
(b) 2 E. 3. 62. 22 E. 4. 39.

12 E. 2. *Jur. ver* 12.

4 H. 6. 15. 22 E. 4. 38. *ibid.*

that found against him, then plead not guilty, though he pleaded it not before.

1 E. 5. 5. **In Assises of** Novel Disseisin **and** Nusance, **he may plead a special matter that amounteth but to the general Issue.** As in an Assise of Rent by Dean and Chapter, to say that rescous was made to the predecessor and no seisin in him, or in any Successor since that time. Though in the pretence of him that pleadeth it, it amount to no more, but that the Plaintiff was never seised, so as he could not be disseised.

(a) 9 E. 4. 21. **Upon** (a) **Indictments of Felony and Treason,** otherwise it is in Appeals, **the Defendant being put to answer,** which is called an Arraignment, **is not allowed**

(b) Stamf. 151. b. **council, if he deny** (b) **the fact.** For either his conscience perhaps will sting him to utter the truth, or otherwise by his gesture, countenane, or simplicity of speech, it may be discovered; which the artificial speech of his Council learned, would hide and colour. Also himself can best answer to the fact. But if he plead Sanctuary, or any other matter in Law, then he shall have

1 H. 7. 23. 32 H. Dy. 13. 41 E. 3. 27. council. **A Presentment in the Leet or Sheriffs turn, after the day of the Presentment** bindeth the party for ever, and is **not traversible, but in cases that touch ones Free-hold:** as that one ought to

5 H. 7. 3. cleanse the High-way or such like, *ratione tenure sue*: therefore the course is to remove such presentments into the Kings Bench by a *Certiorari*, where he may traverse them.

CHAP.

CHAP. 33.

Of Confessions.

COnfession is when the Defendant confesseth the Plaintiffs action to be good. The Defendant confessing an Indictment of Felony may accuse others, inwhich case we call him an Approver. And one cannot (a) be an Approver, but in Felony or Treason. And that upon an (b) Indictment only, and though it be (c) after not guilty pleaded, yet before verdict he may become an Approver. But upon an appeal one cannot be an approver. For without (d) confession of Felony before the Judges, which confession must be (e) upon an indictment precedent (that the judg may at any time give judgment to attaint him) not upon an arrest for Felony of the same offence. But he cannot approve one that (f) received him, for it must be of such an offence as he himself did, together with the other: nor one that (g) abetted, and procured him to commit the Felony, for he confesseth not himself guilty of the same offence, in as much as he cannot abet himself.

(a) 9 H.6.Co.1.
(b) 1 H. 7. 5.
(c) 1 H.7. ibid
(d) 1 H. 5. Co. 441.
(e) Stam.143.a.
(f) Stam.143.c
(g) 10 E.4.14.

Statutes.

Westm. 1. c. 12. Notorious Felons wch.

will not put themſelves upon an inqueſt at the Kings ſute againſt them, ſhall be put to a pain *fort & dure*, as thoſe which refuſe to be tried by the Law of the Land.

(a) *The Stat.* 32. *H.* 8. *cap.* 21. *ſo reciteth it.*

One that flyeth to a Church (a) or Church-yard, and confeſſeth before the Coroner when he cometh, the certainty of any bar, felony, where life or member is to be loſt before he be thereof attainted, whether upon an indictment or appeal, as that he hath ſtoln ſuch or ſuch a thing, killed ſuch or ſuch a man. But at the firſt taking of the Church, it is enough to ſay, he taketh it for a felony, which he hath committed generally may abjure, and ſo ſave himſelf. But not in caſe of high Treaſon, or petty Treaſon, for the Coronor cannot attaint him upon his confeſſion thereof, becauſe he is not his Judge of ſuch a crime: neither can be his Judg as he is Coronor, although he have a Commiſſion from the King to do it. And if the offender, being in the Church, will of purpoſe confeſs a felony, to the intent to eſcape of Treaſon, yet if the Coronor have information that he is charged with a Treaſon, he may not ſuffer him to abjure. And that for the Kings advantage, who is to take more benefit if he be attainted of Treaſon than of felony, becauſe of the eſcheat. The ſame Law it is of petty Treaſon, for the Coronor can no more record his confeſſion of that than of high Treaſon: neither may the Coronor if he be informed that he have committed petty Treaſon, ſuffer him to abjure.

Stamf. 119. *b.*

Stam. 116.

jure of Felony, and that in respect of the heinousnes of the offence, notwithstanding the King be to have no more advantage in petty Treason than in Felony. Neither can a man abjure for petty-larceney, because he is not to suffer death for it likewise. *Br. Coro.* 182.

Abjuration is his (*a*) oath before the Coroner himself to depart the Realm for ever at the time and place set him: going the direct way thither: tarrying there but no flood and ebb if he can have passage: and till he can so pass going every day into the sea up to the knees to assay if he may pass over, and if he cannot pass with in 40 days, then to put himself again into the Church as a Felon, &c. And this abjuration is an (*b*) attainder in it self (and that the strongest that can be, being by his own confession) and a (*c*) forfeiture of his Land. And there is a Writ of escheate of Land for Felony, *pro qua abjuravit regnum*. And therefore he (*d*) that is hanged upon judgment against him, and becometh alive again, cannot abjure (but an abjuration in that case is an escape) for one cannot have two judgments for one offence. (*a*) *Stam.* 119. *b.* (*b*) *Stam.* 122. *c.* (*c*) 4 *El.* 262. (*d*) 3 *E.* 3. *Co.* 33. *f.*

Statutes.

9 E. 2. Stat. de artic. cleri. cap. 10. Those that abjure may not be molested whilst they are in the street, and whilst they be in the Church, their keepers may not tarry in the Church-yard.

9 E. 2. St. de art. cler. c. 15. A Clerk

shall not be compelled to abjure, but to have his Clergy.

21 H. 8. c. 2. Immediately after confession, and before abjuration, the Felon shall be marked in the hand with an hot Iron, with the sign of an A. The Felon must take his passage at such a day and time as the Coronor shall limit, else he shall lose the benefit of Sanctuary, and be taken out, and further ordered according to his demerits, without restitution to Sanctuary.

22 H. cap. 14. If he be found out of the place, he shall dye for it.

22 H. 8. c. 12. All abjurations shall be made to certain priviledged places within the Ream, mentioned in that act, there to remain during his life.

CHAP. 34.

Of Replication, Rejoynder, Surrejoynder, &c.

The mutual pleas of both are the debating before issues, or an issue itself.

Debating before issue, is the discussing of the material things, to draw it to some one issue. As in an action of Trespass or an Assise, if the Defendant claim by a lease from the Plaintiff to A. who granteth his term to B. and to J. the defen-

Defendant, the Plaintiff muſt anſwer only to his own Leaſe, for the aſſignments of *A.* are but conveyances, and not material. But in an aſſiſe, if the Defendant derive his intereſt from a ſtranger, and that *A.* was ſeiſed and enfeoffed *B.* who enfeoffed *C.* and *C.* the Tenant: there the Plaintiff may traverſe any of the mean Conveyances, for they are all material.

Therefore repugnance of a Plea unto it ſelf is a fault in pleading, as in an action of Treſpaſs of his houſe, and walls broken down, the Defendant cannot plead touching the houſe, not guilty, and as to the breaking down of the walls juſtifie, for this carrieth a repugnancy in it, in as much as the houſe and the wall are all one thing.

So is a departure, where he forfeiteth not the matter of his plea that went before, but cometh in with a new matter. As if the rejoynder be a matter puiſne, underneath the matter of his bar, not above and going before it. As in an action of Treſpaſs, the Defendant pleadeth a diſcent unto him of the Land, the Plaintiff ſaith, that after the deſcent the Defendant enfeoffed him. Now if the Defendant rejoyn that the feoffment was upon conditon, and he entred for the condition broken; this is a departure for the matter of the bar, that is, the diſcent, is before the matter of the rejoynder, that is to ſay, the entry for the condition broken, whereby the feoffment is avoided. So in an aſſiſe, the Defendant

pleadeth the feoffement of *J. S.* and the Plaintiff make title to himſelf by diſcent, and that he was diſſeiſed by *J. S.* who enfeoffed the Demandant, or that he enfeoffed *J. S.* upon condition, who brake the condition, and afterwards enfeoffed the Defendant, &c.

Now if the Defendant ſay that after the diſſeiſin (or condition broken) and after the feoffment of *I. S.* to the Defendant, the Plaintiff did releaſe to the Defendant, or confirm the eſtate of the Defendant, this is a departure, for that is a matter that groweth after the feoffment pleaded in Bar. But if he plead ſuch a releaſe or confirmation from the Plaintiff to *I. S.* that is no departure, for it is a matter before the feoffment, or in an action of treſpaſs for goods, if the Defendant title himſelf by the gift of *I. S.* and the Plaintiff ſaith, that himſelf was poſſeſſed till *I. S.* took them from him, and gave them to the Defendant. Now the Defendant may ſay, that after the taking the Plaintiff gave them to *I. S.* who gave them to the Defendant; for although the Defendant might have pleaded theſe things at the beginning, yet in as much as it is purſuing, and fortifieth his Bar, and no puiſne matter underneath the title of his Bar, but eigne, and above the matter of his Bar, therefore it is no departure. So a plea in Bar which is intendible at the Common Law, cannot be maintained by a matter of Cuſtom, or by Statute-Law. As in an aſſiſe the tenant

tenant pleadeth in bar a deviſe unto himſelf of the Land being deviſible by the cuſtom, the Plaintiff ſaith that the Deviſor was within age at the time of the deviſe. Now if the Tenant ſaid that by the cuſtom there an infant of fifteen years of age may make a deviſe: This is a departure, for the cuſtom pleaded in bar ſhall be intended of thoſe that may make a deviſe by the Common Law. So if in an action of Treſpaſs the Defendant plead in bar a leaſe for fifty years from a houſe of Religion, and the Plaintiff avoid it by reaſon it was made within a year before the diſſolution, and ſo void by the Statute 31 H. 8. Now if the Defendant will alledge that by the ſame Statute it is provided that all ſuch leaſes ſhall be good for 21 years, and ſo maintain the leaſe to be good for ſo many years, this is a departure: or if one plead a fine, and that being avoided, becauſe the parties to the fine had nothing, will maintain the fine to be good by the Statute 1 R. 3. becauſe he had levied the fine *ceſti qui uſe*. Laſtly, when matters are pleaded which offer ſeveral iſſues, that is termed a double plea, and is a fault in pleading. As in an aſſiſe to plead a feoffment of the Anceſtor with Warranty. In debt upon a ſimple contract to plead payment and an acquittance. In an aſſiſe to plead divers deſcents of the Land in fee-ſimple, for every of them requireth a ſeveral anſwer. But in an aſſiſe to plead divers

diſcents

discents in tail, is not double, for one answer maketh an end of all, that is to deny the gift in tail, So as the matter cannot come but to one issue: So in an action of debt to plead fully administred, and so *riens enter mains*, for one answer, assets *enter mains* serveth.

So is it also of two or three matters together with the general conclusion, as in debt upon an obligation to say, that he is not lettered, and the Deed was read unto him in another sort: and further, that he delivered it upon a condition, which is not performed, so not his Deed. So to justifie an arrest for twenty causes of suspition of felony, is not double, for one answer serveth *De son tort demesne*. No more to assign in a Writ of error as many errors as appear in the record, for in *millo est erratum*, answereth them all. But to assign divers errors *en fait* is double, for these are to be tried by the Country. And the reason of all this is, because upon divers issues joyned, if one be found for the party, and another against him, the Court shall be inveigled, and not know how to give judgment, whether for him, or against him. But to plead a feoffment with warranty, and relye upon the warrranty only is not double, for he cannot plead the Warranty without the feoffment.

Of the first sort are Replication, rejoynder, surrender, &c.

In

In an assise against many, if each (a) (a) 33 H.6.36.
vse the whole tenancy severally, and (b) 33 H. 6 36.
find (b) several matters in bar: or (c) (c) ces Br.ass.1
one Nul tort, and the other in bar: other- 383.
wise (d) it is if one plead in bar, and the o- (d) 44 E. 3.23.
ther joyntenancy by deed: the Plaintiff at his peril must chuse his Tenant. And after issue for the whole, that, viz. the Tenancy, shall be first inquired of. And being found for the Plaintiff, then the other issue shall be inquired. Being found against him, and no title made against the tenant indeed, the writ shall abate. 8 ass. Pl. 1.

ces ibid.

In an action of trespass meer transitory, although the Defendant justifie by no special matter, as in a (a) Trespass of (a) 19 H. 6.65
goods, by commandment of J. S. whose the property is, in (b) assault and battery, (b) 34 H. 6.16
or an (c) appeal of maime, in his own de- (c) 14 ass. Pl. 21
fence upon the plaintiffs first assaulting of him: in false imprisonment by (d) being (d) 5 H. 7. 6.
Constable of the Town, and that the Plaintiff brake the Peace, or (e) by an arrest (e) 2 E. 4. 9.
for suspition of Felony, or by (f) the com- (f) 22 ass. Pl.
mandment of J. S. to seise the body of the 85.
Plaintiff in ward, by reason his ancestor whose heir he is, held of J.S. by Knight service, &c. yet the Plaintiff may take issue that it was done De son tort demesne, which is to say, wrongfully by the Defendant, without answering to that matter. But if the Justification be by matter of writing, or record, as in false imprisonment, by (a) a (a) 21 H. 6.5.
warrant of Justice of peace to arrest him, or

(b) 5 H. 7. 6. a (b) *capias* that came to him as Sheriff to
2 E. 4. 9. take the body of the Plaintiff, or if it be by
(c) 44 E. 3. 18. (c) title or licence (d) from the Plaintiff
22 Ass. Pl. 185. there *de son tort demesn* is no plea, but the
(d) 12 E. 4. 10. ſpecial matter muſt be anſwered. So if
waies in a treſpaſs local, as of his cloſe
broken down, &c. If the Defendant incite
a ſtranger to the Land, whether to the free-
hold, or though it be but to a leaſe of it, and
juſtifie by his commandment. And like-
(f) B. Roy. wiſe in a (f) replevin which is real, the ti-
tle or ſpecial matter muſt always be tra-
verſed. If it be a treſpaſs upon land, the
Defendant juſtifying in ſome other land
than the Plaintiff meaneth, the Plaintiff
may make a new aſſignment, ſetting
27 H. 8. 7. forth the place more ſpecially. As if the De-
fendant juſtifie in a place called *A.* as his free-
hold, the Plaint. may ſay in the place where,
&c. is called *B.* other than the place called *A*
and then the Defendant may plead all ancw

CHAP. 35.
Of Iſſues.

AN Iſſue is when both the parties
joyn upon ſomewhat that they
refer unto a trial, to make an end of the
Plea. And it is of the fact, or law of
the fact, which is commonly termed by
the general name of iſſue, when the proper
contradiction of that which one alledge-
eth is ſet down by the other, which is
properly termed a traverſe. As in debt upon
an Obligation for performance of Cove-
nant

ans, and the defendant plead he hath performed all, the Plaintiff must shew some in certain which the Defendant hath broken, whereupon issue shall be joyned: but cannot reply that the Defendant hath not performed all. For in Logick there be three kinds of contradictions: General, when both the Propositions are general, as, All the covenants are broken, None of the covenants are broken. Particular, when one is General, the other particular, as, all the covenants are broken, some of the covenants are not broken, none of the covenants are broken, some of the covenants are broken. Proper, when both the propositions are proper, as, this covenant is broken, this Covenant is not broken. The two former make no issue in our Law, but the latter only: and every issue is of an affirmative and a negative. **After which if any insufficiency of pleading appear in the record, whether the issue be joyned thereupon** which we call a *Jeofaile*, or no, **the parties must** replead or **begin a new where the first defect was.** And in this case a Jury is ready at the bar that to pass upon the issue, shall be discharged. As if the bar be good, and the replication ill, and issue taken upon it, the judgment must be that the Plaintiff must make a new replication, and the bar shall remain. So if the bar be good, and likewise the replication, but the rejoynder ill, and the issue taken upon the rejoynder, the defendant must take a new rejoynder,

15 *H.* 7. 2.

33 *H.* 6. 9.

35 *H.* 8. *Br. replead.* 54.

7 *H.* 7. 3.

rejoynder, and the replication shall remain. But if the Bar be ill, and the replication good, and the issue taken upon it, now they must plead all a new, because the bar which is first of all is vicious.

But no repleader shall be in an assise, **if the Plaintiff have disclosed a sufficient title**: for in an assise no Land in certain is demanded, but an assise only prayed. And therefore where a sufficient title is disclosed, the Plaintiff shall have judgment upon seisin, and disseisin found for him. And no repleader shall be notwithstanding that the Tenant have made a (*a*) vicious bar or (*b*) misrejoyned. Otherwise it is if the Plaintiff take issue upon an insufficient bar.

(*a*) 14 H. 7. 12.
(*b*) 5 H. 7. 29.
33 H. 6. 37.
5 H. 7. 29.

If the tender of this issue come on the Plaintiffs part, the form is, *Et hoc petit quod inquiratur per recordu, vel patrid, &c.* **If on the Defendants part, then it is,** *Et de hoc ponit se super recordum illud vel se per patriam.*

Issue in a writ of right cannot be joyned, we call it joyning of the mise, **upon the meer right, but by the party himself,** not by Attorney.

19 H. 6. 57.

Where the Plaintiff in his replication maketh title at large, without traversing or confessing and avoiding the bar, or any way medling with it, **the Tenant may joyn issue upon the title by saying,** *Voiez assise sur la title*, that is, Let the assise come upon the title, which is called a pleading to the assise at large. This to be understood when

15 H. 7. 13.
15 H. 7. *ibid.*
5 H. 7. 29.

where the title is by a matter *en fait*, but not record, or done (*a*) in a forein County, for they are not tryable by the assise.

(*a*) 5 H. 7. *ibid* 14 H. 7. 6.

And in a personal action, whether trespas or replevin where justification is made for damage feasant, for that is meerly in the personality, where the title of the Land cometh in question, lyeth not till issue joyned. And yet in that case it never lyeth for Tenant for life, but only for Tenant for yeare, Bailiff, &c.

46 E. 3. 11. 10 H. 6. 26. 14 H. 7. 6. 4 H. 6. 10.

Prerogative.

And in these actions shall be of the King before issue joyned only, though the King be seised but in his natural capacity, as in the right of his Dutchy of *Lancaster*.

5 E. 4. *aid de Roy.* 50. 3 H. 6. p. Pl. 216

CHAP. 36.

Of Trial by Jury.

THis being of a matter *en fait*, that is to say, done in the Country. For a Jury shall not be charged with a matter in Law; nor it shall not be given in evidence unto them. But if they will take knowledge of the Law, they may give their verdict generally, *viz.* where a verdict may be given at large. As upon a issue of *Nul tort nul disseisin*. So the Jury may find of themselves matters of record

9 H. 6. 38. 14 El. Pl. 410.

record if they will, and although it be not given in evidence. And therefore a fine or common recovery may be given in evidence without shewing it under the great Seal, or Seal of the Court, or vouching the Roll of the Recovery, for the Jury may find them if they will. But peradventure they are not bound to find it upon pain of attaint, unless it be shewed under the Seal.

Old N. B. 171. 11. *b.*

The form of the writ of venire facias.

is triable by the oath of twelve free and lawful men of the same County, indifferently chosen, whom we call a Jury, and the making of the Jury is called a panel or array. And these must be 12 for the verdict

(*a*) 41 *ass. Pl.* no more or less, as of (*a*) 11 or 13 is void.

(*c*) 26 *ass-Pl.* 28. free, not (*c*) villeins, nor (*d*) aliens: but

(*d*) 14 *H.* 4. 19. ful, for one outlawed may not be a Juror.

(*e*) 21 *H.* 6. 30. because he is not *Legalis homo*, (*e*) and

(*f*) 9 *H.* 6. 63. the same County, for upon (*f*) a trespass local, as grass cut down in the County *D.* where the Trespass was in the County of *S.* if the Defendant plead not guilty (as he may) and the Jury find him guilty in the County of *S.* the verdict is void. But if they find them guilty generally, the attaint lyeth. But upon an issue whether the Executors have assets in their hands, the Jury may find the assets in any County, for it is but a transitory thing. Lastly, the Jury must be indifferently chosen, so as neither the Sheriff that maketh it (for that is good cause of challenge to the panel or array) nor the Jurors that are to pass upon it (for that is good cause of challenge to

28 *H.* 8. *Dy.* 30.

pub) bear either favour or malice to any party. As for the Sheriff to put in any Juror at the parties denomination. And either the Sheriff or Juror to be of his (a) Fee, or his (b) servant, or within (c) his distress, whether his Tenant (immediate or not immediate, as (d) holding of J. S. who holdeth of the party) or not his Tenant, as where he is to come to the parties Hundred, or the party hath a Rent-charge going out of his Land. To be of kin to the party, for Cousinage in the Sheriff is a good principal challenge to the array, and in a Juror to the Poll: although it be in the ninth degree, and that one cannot be heir to the other of the land in variance. As if Husband and Wife be vouched (which is intendible for the warranty and Land of the wife) and the Sheriff or Juror be Cousin in the ninth degree unto the Husband, the reason whereof is, for the affection which the Law intendeth that the one doth carry to the other. And because one may be heir to the other of other land. And therefore it is a good challenge in personal sutes also: To have been (a) arbitrators on his part in that matter. To (b) have an action of battery depending against the party, or an action of debt by the party against him, &c. The Juror to have (c) taken money for his verdict to have (d) given it beforehand, or to have (e) passed formerly in the same matter, and such other things as of themselves carry favour or malice in them, and are called principal challenges. So

7 H. 4. 10.
(a) 8 ass. Pl. 23
(b) 21 E. 4. 67.
(c) 20 H. 6. 39. for the Sheriff.
(d) 38 E. 3. 25.
38 E. 3. ibid.
15 E. 4. 18.
Br. chall. 68.
38 E. 3. ibid. maketh a query of this.
15 Eliz. Pl. 425 for the Sheriff.
21 E. 4. 63. for a Juror.

(a) 21 H. 6. 39. for the Sheriff.
3 H. 6. 24. for the Juror.
(b) 11 H. 4. 26.
(c) 49 E. 3. 2.
(d) 49 E. 3. 1.
(e) 7 H. 4. 11.

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of thoſe which only do induce it: as to be the parties (*f*) Maſter, (*g*) Councellor, Attorney, (*h*) Steward of his Manor, to (*i*) ſue him in an action of debt, &c. to be (*k*) of the ſame ſociety with him, as if both be of Graies-Inne, or the (*l*) party to be within his diſtreſs, or (*m*) he to have paſſed before upon ſuch another matter.

(*f*) 21 E. 4. 67 *for the Sheriff* 14 H. 7. 2. *for a Juror.*
(*g*) 49 E. 3. 1.
(*h*) 14 H. 7. 2.
(*i*) 11 H. 4. 26.
(*k*) 20 H. 7. 2.
(*l*) 14 H. 7. 2.
(*m*) 18 E. 4. 13

Statutes.

Weſtm. 2. cap. 38. In an Aſſiſe no more ſhall be ſummoned but 14.

Men above **Lxx.** years of age continually ſick, or ſick at the time of Summons, ſhall not be returned in Juries or Aſſiſes: nor any that dwell out of the County, unleſs it be in grand Aſſiſes.

Artic. ſuper chart. cap. 9. 34. E. 3. cap. 4. Juries ſhall be made of the next people of the County.

11 H. 6. cap. 1. None dwelling in Stews ſhall be of a Jury.

9 E. 3. cap. 4. A Deed pleaded in a Franchiſe ſhall be tried in the County where the action is brought.

2 E. 6. cap. 24. Upon ſtroke or poyſon in one County, the party dying in another, an indictment and tryal may be in the County where he dyeth. And an appeal ſued

ſued there, and tried by twelve men of the ſame County.

Likewiſe the acceſſaries in one County to a Murder or Felony in another County, ſhall be indicted, arraigned, &c. in the County where the offence of acceſſary is done.

33 H. 8. cap. 20. Indictment of a perſon Lunatick, being at the time of confeſſion of Treaſon before the Council, of perfect memory, and ſo certified by them, ſhall be tried by Free-holders of any Shire to be appointed by commiſſion. And the tryal whether he be culpable or not, ſhall be there in his abſence.

13 H. 8. cap. 23. Confeſſion of Treaſon Miſpriſion of Treaſon, or Murder being made before the Council, or three of them, or they vehemently ſuſpecting one of ſuch offence, it ſhall be inquired, heard, and determined by Commiſſion out of the Chancery, in the Shire or place limited in that Commiſſion, by ſuch lawful perſons as ſhall be returned; wherein no challeng for the Shire or Hundred ſhall be allowed.

28 H. 8. cap. 13. and 27 H. 8. cap. 4. All Treaſons, Felonies, Robberies, Murders, and Confederacies within the Admirals Juriſdiction ſhall be inquired and determined in ſuch form of Law as if it were done upon the Land, by Commiſſion directed to the Admiral and three or four other aſſigned

by the Lord Chancellor in the Shire limited in their Commiſſion, where no challeng ſhall be for the Hundred.

32 H. 8. cap. 4. The indictment and arraignment of treaſons and miſpriſion of treaſons in *walis*, or elſe where the Writs out of the Chancery of *England* run not, ſhall be in ſuch Shire, and before ſuch Commiſſioners as the King ſhall appoint.

35 H. 8. cap. 2. All Treaſons, Miſpriſions, or concealments of Treaſon done out of *England*, ſhall be inquired, heard, and determined in the Kings Bench by men of that Shire, where the Bench ſitteth, or elſe before Commiſſioners, and in ſuch Shire as ſhall be limited by Commiſſion.

1 And 2 Ph. and Mar. cap. Trials for Treaſon ſhall be according to the courſe of the Common Law.

23 E. 3. cap. 3. No indictor be put in Enqueſts upon the deliverance of Indictees of Felonies or Treſpaſs.

Weſtm. 2. cap 38. None ſhall be put in Aſſiſes or Juries triable in their own Shire, but ſuch as have 20*s.* a year Free-hold, nor in aſſiſes triable out of their own Shire, unleſs they have 40*s.*

21 E. 1. *De ponend' in Aſſiſa.* None ſhall be put in aſſiſes triable out of their own Shire but ſuch as have lands to the yearly value of 2 C. *s.* nor in aſſiſes triable in their own Shire, unleſs they hav 40*s.*

2 H. 5

2 H. 5. c. 3. None ſhall paſs in an Inqueſt upon the tryal of the death of a man, nor between parry and party in plea real or perſonal, whereof the debt and damages amount to 40 marks, unleſs he have Lands of the yearly value of 40*s*.

33 H. 8. c. 13. In Cities, Boroughs, or Corporate Towns, an Inhabitant being worth 40*l*. in goods, ſhall be admitted in trials of Murder and Felonies in every Seſſion and Gaol-delivery for that Town, though he have no free-hold.

35 H. 8. cap. 6. **Made perpetual.**

2 E. 6. c. 32. The cauſe of having 40*s*. value, muſt be inſerted in the *venire facias*; and be of Lands out of antient demeſne. Where that clauſe needs not, the Jurors muſt diſpend ſome Land of Free-hold out of antient demeſne within the County where the iſſue is to be tried.

27 El. c. 6. Where the Jurors returned in the Kings Bench, Common place, Exchequer, or before Juſtices of Aſſiſe, ought to have 40*s*. Free-hold, there they ſhall from henceforth have 40*l*. yearly Free-hold out of antient demeſne, in the County where the iſſue is to be tried. And the clauſe thereof inſerted in the *venire facias*. Theſe two Statutes extend not to Corporations.

27 El. c. 7. No Bayliff of Liberty ſhall return to the Sheriff, or deliver unto him

the name of any perſon to be returned in a Jury without ſome addition whereby the party may be known. Neither ſhall the Jury, &c. return any Juror out of a Liberty without ſome addition whereby he may be known, nor within a Liberty with other addition than that is delivered unto him by the Bayliff, &c.

8 H. 4. cap. 3. Every Juror returned within the County of *Middleſex* ſhall be called the fourth day of their return, and appearing at the ſame day, their appearance ſhall be recorded, and they ſhall not be amerced, nor loſe their iſſues.

5 E. 3. cap. 10. A Juror taking of the one part or of the other, ſhall never be of Jury more, and beſides impriſoned.

34 E. 3. cap. 8. The party or any ſtranger may ſue him for it.

38 E. 3 cap. 12. And both the Juror and embraceors to procure it, being thereof attainted, ſhall pay ten times ſo much as he hath taken.

Weſtm. 2. cap. 30. Aſſiſes of novel diſſeiſin, Mortdanceſter, and Attaints, ſhall be taken thrice a year by two Juſtices aſſigned, aſſociated with one or two diſcreet Knights in the Shire where they come.

In every Shire before their departure they ſhall appoint the day of their return: And adjourn the Aſſiſes if the taking be by any means deferred.

Alſo

Also in assises of mortdancester being resisted, they may adjourn into the Bench if need be. And when it cometh to the taking of the assise, the Justices of the Bench shall send it back again to them.

All Pleas in either of the Benches that require small examination shall be determined before them.

27 E. 1. cap. 4. *Statutum de finibus levatis.* Such Inquests being taken, shall be returned into the Bench, and there Judgment shall be given.

Inquests and Recognisances determinable before Justices of either Bench: shall be taken in vacation time, before any of the Justices before whom the plea is brought, being associate to one Knight of the same Shire, where such Inquests shall pass, unless it require great examination.

12 E. 2 cap. 3. Stat. Eborac. Inquests in pleas of Land (that require no great examination) shall be taken in the County before a Justice of the place where the plea is accompanied with a substantial man in the County, Knight or other, so that a certain day be given to the Bench, and a certain day and place in the Countrey, in presence of the parties demanding of the same.

Inquests in pleas of Land that require no great examination, shall be taken in the Countrey, (in manner aboveſaid) before

two Justices of the Bench.

2 E. 3. cap. 17. All such Inquests in plea of Land shall hereafter be taken as well of the request of the Tenant, as Demandant.

42 E. 3. cap. 11 *Nisi prius* shall not be granted before the name of the Jurors returned.

7 R. 2. cap. 7. In all manner of pleas where a *Nisi prius* is grantable of office after the great distress returned and thrice served before the Justices against the Jurors, and thereupon the parties demanded if any of the said parties will pursue, or if the parties refuse to have *Nisi prius* in the case, then at the sute of any of the Jurors that is present a *Nisi prius* shall be granted for ending of the quarrel.

14 E. 3. cap. 16. The *Nisi prius* in the Kings Bench shall be granted before a Justice of that place, if any Justice of that place may well go into those parts. Else before a Justice of the Common place, &c. otherwise the chief Baron being a man of the Law, if, &c. or else before the Justices assigned to take assises in those parts. So that one of them be a Justice of one Bench or other, or the Kings Serjeant sworn.

18 Eliz. cap. 12. The chief Justice of *England* upon issue joyned in the King Bench or Chancery, and the Chief Justice of

of the Common Pleas, and chief Baron of the Exchequer, upon iſſues joyned in their ſeveral Courts (or in their abſence two other Juſtices or Barons) or made Juſtices of *niſi prius* for the County of *Middleſex*, in all cauſes joyned to ſit in *weſtminſter* Hall within the Term, or four day after.

4 E. 3. cap. 11. confirmed. 7. R. 2. cap. 15. Juſtices of *niſi prius* ſhall inquire, hear, and determine, as well at the Kings ſuit as the parties, all maintainers, conſpirators, makers of confederacy, & commiſters of Champerty, and all other things contained in the ſaid Article, as well as Juſtices of Oyer ſhould do, if they were in the ſame County.

14 H. 6. c. 1. Juſtices of *niſi prius* have power in caſes of Felony and Treaſon as well upon acquittal, as attainder, and thereupon to award Execution.

Stat. Eboz. 12. E. 2. cap. 2. Upon a deed denied where witneſſes are named, proceſs ſhall be awarded againſt the witneſſes, if they come not at the grand diſtreſs, or upon a *nihil non inventus* returned, or the taking of the inqueſt ſhall not be deferred. If he come at the grand, and the inqueſt remaineth untaken for ſome cauſe, the witneſſes ſhall have *idem dies*, and not appearing, then the firſt iſſues returned on them ſhall be forfeit, and the inqueſt taken, notwithſtanding their abſence.

An

An Inquest shall be taken notwithstanding the absence of witnesses dwelling in a Franchise where the Kings Writ runneth not. **Four of the Jury must also be of the same Hundred**, and so many are enough though it be in an attaint where the Jury is 24. In an information upon the Statute of plurality of Farms, for having given Farms in seven Towns in four several Hundreds: If four of the Jury have any thing, or dwell within any of the four several Hundreds it is sufficient.

7 H. 4. 17.
36 H. 8. Dy. 61.

Statutes.

15 H. 8. c. 6. **Made perpetual.** 2 E. 6. cap. 32. Six sufficient Hundreds shall be returned in every Jury.

27 El. cap. 6. If two sufficient Hundreds appear in any personal action, it is enough.

If the thing in issue lye in the notice of two several Counties, and not of one only, for (a) only two Counties may joyn, and no more. And two may though they be not the next, as *Kent* and *Devon-shire*, the **Jury shall be made** (b) **equally out of both**: That is, six out of the one, and six out of the other. And this we call a joynder of Counties, as in (c) an action of Trespass, I the Defendant justifie for common appendant to Land in another County, or in a writ of annuity and Count of a seisin in another County then where the Church is, out of which the annuity goeth.

(a) 15 *Eliz.*
(b) 49 *ass. Pl.* 11.
(c) 49 *E.* 3. 19.
21 *H.* 6. 3.

Sta-

Statutes.

1 E. 2. cap. 10. An assise of novel dis-
of Rent out of the Tenements in di-
Counties, shall be in the confine of the
Counties.

But upon an indictment of an offence
the Crown, the tryal shall never
joynder of Counties. Therefore an
dictment that one stroke *J.S.* in one Coun-
of which stroke he died in another
ty, is no good Indictment, because it
not be tried, for that the Counties can-
joyn in an indictment. And therefore be-
the Statute 2 and 3 E. 6. (which al-
reth the Law in this case) they were wont
carry the Corps into the County where
stroke was. But otherwise it is in an ap-

4 H. 7. *Coro.* 60
6 H. 7. 10.

But if the Defendant plead in any
on, as in a *homine replegiando*, or though
be but in a Writ of Tresp. or Debt,
that the Plaintiff is a villein regardant
a Mano; of his in another County, yet
same shall be tried in the County
here the Writ is brought. And this is in
favorem libertatis.

19 H. 6. 18. *by the common law*
40 E. 3. 36.

18 E. 3. c. 1. confirmed. 6 H. 6. c. 28?
every sute between an Alien and a De-
zine, (though the King be a party) the
e half of the Jury shall be the Aliens.
so many be in that visne, and if there be
not

not to that number, then ſo many as be there not parties, nor with the party to the ſuit.

2 *Mar. Pl.* 117. **Where a Peer of the Realm is party to the action, a Knight muſt be returned to the Jury.**

Statutes.

Magn. chart. cap. 29. A Peer of the Realm upon an indictment of Felony or Treaſon ſhall be tried by his Peers.

20 **H.** 6. **cap.** 9. Dutcheſſes, Baroneſſes, Counteſſes, ſole or married, ſhall be tried (in ſuch caſes) as Peers of the Realm. In a Court of Pipowders the trial is by the Merchants.

Provable of the Stat. 7. *E.* 4. *c.* 2. *ſo reciteth it.* 39 *E.* 3. 2. 1 *Mar. Dy.* 98. *There muſt be twelve beſide the four Knights Brat.* 42.

The Jury in a Writ of right is called the grand Aſſiſe. Being four Knights, or other in default of Knights chuſing a Jury of 12. unto them. So note 16. in all, for the grand Jury is always about 12, and therefore no attaint lyeth for him that loſeth in a writ of right, becauſe it paſſeth by the grand Aſſiſe which is more then 12.

Challenges are here allowed for the parties (if they will) both to the array and to the polls. And whether to the panncl or the pols, are to be tried by ſome of the Jurors, if it be (a) before any Juror ſworn the Court ſhall chooſe the Triors, when any Jurors are ſworn, they muſt try it.

(a) 27 *H.* 8. 25.

Challeng to the array is when the Jury is not ſufficiently impanelled as

cause of challeng to the Sheriff, and
wards to the Coroners, who by reason
just exception against the Sheriff made
should make the array, the (d) Court
chuse certain named Esloiers (e)
the parties shall never have chal-
ng to the whole array. Challeng to the
ll is when any of the Jurors are insuf-
ent to pass upon the trial. This chal-
ng must be taken before the pannel be
used: For if the Plaintiff challenge one,
d when the panel is perused, the Defen-
t challeng the same person, yet the
intiff may release his challeng, and then
e Juror shall not be drawn, because the
fendants challeng is nothing worth, in
t it was not made till the panel was pe-
sed, and shall be tried by two of the Ju-
s chosen by the Court, against whom
challeng shall be admitted, but challeng-
that sound not in reproach of the juror,
as be (a) of council with the party, or
) within his distress, to have (c) nothing
ching the Hundred, or (d) not suffici-
t free-hold, shall be examined upon his
th, which we call an examination upon a
ris dire. He that challenged the array if
pass against him, or (which is as strong)
e release it, shall never challeng the
ll without shewing cause presently,
ich shall be tried out of hand. Before
e Clerk pass through the pannel. So shall
any other challeng. And after challeng
a Juror for one cause, as favour, &c. who
passeth

14 H. 7. 31.
4 H. 7. 3.
(d) 8 H. 6. 12.
15 E. 4. 24.
(e) 15 E. 4. 8.
27 H. 8. 26.
27 H. 8. 26.
(a) 49 E. 3. 1.
(b) 3 H. 6. 36.
(c) 19 H. 6. 9.
(d) 21 H. 7. 29.
27 H. 8. 26.
7 H. 4. 46.
7 E. 4. 17.

passeth against the challenger, he shall not challeng him for another, as for having nothing in the Hundred, &c.

Stam. 157. *b. Do. St. p. Br. Chal.* 11 *in an appeal.*

In indictments and appeals of Felony the Defendant may challenge 35 Jurors without shewing cause, which is called a peremptory challeng.

Statutes.

22 H. 8. cap. 14. No person arraigned for any petty Treason, Murder, or Felony shall be admitted to any peremptory challenge above the number of twenty.

20 E. 4. 11. *Stam.* 159. *t.*

When there lacketh some to fill the Jury, as the greater part being returned dead or not appearing. But if all the pols be challenged and drawn, there no *tales* shall be, but a new *venire facias* for *tales* referred to (*quales*) some like thing, other of the same sort shall be taken, for there may be many *tales* one after another (*a*) till it be full, which we call a *Tales*, which must be of (*b*) even number (*c*) less than the principal panel, As a *decem tales*, *octo tales*, &c. or in an attaint where the Jury is 24. 20. *tales*, &c. And (*d*) every tales must be of a less number than other. As after a *Octo tales*, a *Sex tales*, but not a *decem tales*, nor an *Octo tales* again.

(*a*) *Stam.* 155. *t.* (*b*) *Brack. tales.* 11. (*c*) 37 H. 6. 12. (*d*) 14 H. 7. 2.

Statutes.

35 H. 8. c. 6. Made perpetual. 2 E. 6. cap.

32. A *Tales* may be made up before Juſtices of Aſſiſe or *Niſi prius* of able perſons of the ſame County, then preſent at the prayer of the Plaintiff or Demandant.

4 Ind 5 Ph. and Ma. cap. 7. So for the King upon requeſt by any authoriſed hereunto, or aſſigned of the Court, or by the party that followeth upon a penal Statute as well for the King as for himſelf.

15 El. cap. 9. Such a *Tales de circumſtantibus* before the Juſtices of *Niſi prius* ſhall be granted at the prayer of the Defendant or Tenant.

But in **Indictments and Appeals that touch life**, a *Tales* may be of a greater number than the principal pannel. As a 40 tales or as many as the Court will award, and that is in reſpect of the peremptory challenge of 35. 14 H. 7. 7.

The Jury being charged, may neither eat nor drink (but by leave of the Juſtices) before their verdict given, and doing before they be agreed, it maketh their verdict void. After they be agreed it is not finеable. 20 H. 7. 3. 6 H. 8. Dy. 3.

The Jury upon arraignment either of the (a) Kings ſute (b) or in an Appeal acquitting one that was found guilty of (c) death of a man upon an inquiry (d) by the Coroners *Super viſum corporis* muſt find who did the fact. But upon an Indictment (e) before the Sheriff or Juſtices of

(a) 14 H. 7. 12.
(b) 14 H. 7. ib.
(c) 13 E. 4. 3.
(d) 13 E. 4. ib.
4 E. 6. 12.
(e) 14 H. 7. ib.
4 E. 6. ibid.

of peace, for that is not of Record, as the
(f) 13 E. 4. ib. finding before the Coroner is, (f) neither
4 E. 6. ibid. doth this take place in an acquitall upon an Indictment for the felonious taking of goods.

7 E. 6. Pl. 91. ibid. **The Jury in an assise of** *Novel disseisin* (which are there themselves properly called an assise) **shall inquire of the plea in abatement**, though the issue be joyned upon the seisin and disseisin. **And therefore no plea in abatement is there answerable.**

34 E. 1. *De Conjunctim feoffatis.* The defendant in assise alledging joyntenancy of his part with a stranger by Deed, the Plaintiff may aver him to be sole tenant; whereupon Process shall be made against both the defendant and the stranger. And if a the day both of them justifie the feoffment, they shall maintain the exception, and further answer to the Assise, as if the original had been purchased against him joyntly. If the exception be proved false by the Assise, they shall have a years imprisonment, though the Assise pass for them. If the Defendant absent himself at the day the Assise shall pass against him by default, though the stranger appear and justifie the Deed. Whether both, or one appear, if it be found by the Assise that the Exception was truly alledged, the Assise shall pass no farther, but the Writ shall abate. Such an Exception shall not be allowed

lodged by the Bayliff of any Tenant. The like processes in assises of *Mortdancester* and *Juris utrum*.

An Infant bringing an Assise, if a matter *en fait*, that is, done in the same County be pleaded against him, whether in Abatement, as in an assise of Rent, that he had made his plaint of the same land whence he supposeth this Rent to be issuing: or in Bar (b) as the Deed of his Ancestor, with warranty, **the Jury shall inquire of all the circumstances.** Otherwise it is a Writ (c) of entry *sur disseisin*, or other (d) *Præcipe quod reddat*: for there the point put in issue and no other, shall be tried by the Jurors. Otherwise it is also in an Assise upon pleading a recovery (e) against him, or other matter of Record: in that case he must answer, and the Jury shall not inquire of the circumstances, for the Court shall plead and maintain for him.

11 *Ass. pl.* 6.

(b) 48 *E.* 3. 33.

(c) 9 *E.* 4. 34.

(d) 48 *E.* 3. *ib.*

(e) 48 *E.* 3. *ib.*

The like inquiry of the circumstances shall be, if in an assise brought against him he plead to the assise at large. Otherwise it is if he plead in Bar, for there if the Plaintiff make himself title as by a statute Merchant, &c. and the Infant traverse the title which is found against him, the Plaintiff shall have judgment without inquiring of the circumstances, because the issue is taken out of the point of the assise, and therefore shall one as if the Infant were of full age. So that it is better for an infant to plead unto the assise at large, than otherwise.

28 *Ass. pl.* 21.

Old N. B. 104. The form of an Assise of *novel Disseisin*, is this, *Rex vic' salutem. Quæstus est nobis A. qd. B. injuste, & sine judicio disseisivit eum de libero tenemento suo in* N. *infra triginta annos jam ultimos elapsos. Et ideo tibi præc' qd si prædict' A. fecerit te securum de clam' suo pr'os tunc fac' tenement', illud reseisum de catallis quæ in ipso capt', & ipsum ten' cum catall. esse in pace usq; ad proximam assisam, cum Justic' nr'i in partes ill' venerint. Et in tantum fac' 12 liberos & legales homines de visam illo videre tan' illud, & nomino eorum imbreviari*

14 El. D. 310. for all. *fac' Et sum' eos per bonos sum' qd sint coram præfat' Justic' nr'is ad præfatam assisam parati inde facere recogn'. Et pona per vadium & salvos pleg' præd. B. vel balivum suum si ipse inventus non fuerit qd tunc sit ibi ad illud recogn' auct'. Et habeas ibi summ' nomina pleg': & hoc breve. Teste, &c.*

40 E. 3. 48. 39 Ass. pl. 31. **If the Tenant in a Mortdancester** (be it Tenant of the Land, or Tenant by his Warranty) **traverse any point of the writ**, as the dying seised of his ancestor, &c. which goeth in abatement of the writ, **yet the Jury shall inquire of all the points**, as whether the demandant be next heir, and whether his Ancestor died within fifty years, &c, **and any one found against the Demandant abateth the writ.** But a plea in bar of the assise by matter of record, release, collatteral warranty, or such other matter as is out of the three points of the Assise, is peremptory to the Tenant, if it pass against him. And if such a Plea in Bar be found against the

the Tenant, and yet the Jury inquire further and find one of the points of the Writ against the Demandant, as that his Ancestor died not seised, &c. he shall recover notwithstanding that, for such an inquiry should not be upon a plea in Bar. *Dyer* thinketh it to be so likewise, where the Tenant voucheth, and the Demandant doth counterplead the voucher, *viz.* that in that case though the counterplea be found for the Demandant, yet that all the points must be inquired and found for the Demandant, or else he shall not recover. But *Fitzherbert* thinketh otherwise in that case, because it is a plea in Bar, and not to the writ.

For the Juries direction in their verdict greater liberty is permitted in pleading, and matter doubtful in Law, for a Traverse may be omitted. As in Debt, against an Executor, it is a good plea to say, Administration was committed to him, and therefore he should be named Administrator, and not Executor, without traversing that he is not Executor, for the Lay-people know no difference between one administring as Executor, and one administring as Administrator. 9 E. 4. 33.

The special matter may be pleaded together with a general issue, &c. As that the Obligation put in sute, was sealed by him and delivered to *A.* to keep till certain Indentures were made between the Plaintiff and him, before which Indentures made, the Plaintiff took the Obligation out 9 H. 6. 38.

out of the poſſeſſion of *A.* So is it not his deed. This is good, and yet by this general concluſion the matter precedent ſhall not be waved, for it were perillous to put the ſpecial matter in the mouth of the Lay-people.

The Count may be abridged before verdict, ſo as the original remain true, as

14 *Aſſ. Pl.* 9. in an aſſiſe of his Free-hold, and make his
4 *E.* 4. 33. plaint of Land and Rent, he may abridge
14 *H* 6. 4. it for the Rent. In an aſſiſe of his Free hold in *D.* and demand two Manors in *D.* he may abridge his plaint for one. But being of his Free-hold in *D.* and *S.* and demand one Manor extending into both, he cannot
10 *El. Dy.* 172 abridge either of them, for then the writ remaineth not true. In a writ of waſte and aſſign it among other things, in racing of a Copper fixed to the ſoil, he may abridge the waſt aſſigned in that, ſo as thereby he falſifie not his writ. But if the writ be *Quare vaſtum fecit in domibus boſcis & gradinis*, he
39 *E.* 3. 10. cannot abridge the waſte ſuppoſed in *domibus.* In a writ of ward *De cuſtodia terræ & hæredis*, and Count of the Manor of *D.* and 15 Acres of Land, which in truth are parcel of the Manor, and pleaded by the Defend. in abatem. of the writ: he may abridge his demand of the 15 Acres. In treſpaſs *de bonis & catallis captis*, and count of money taken away (for which this form will not ſerve,
39 *E.* 3. 20. the money muſt needs be expreſſed in the
Br. abridg. 111. writ) he may abridge the count touching that.

Sta-

Statutis.

21 H. 8. cap. 3. The Demand of a thing imire may be abridged before verdict, though thereby the writ become false. After acquittal upon an appeal or indictment of Felony or Treason, he shall never be drawn in question for the same offence again. Therefore upon an Indictment of Man-slaughter or Murder, the Justices (by discretion) were wont not to proceed to arraignment till the year and the day were past, for otherwise if he should be acquit upon his arraignment, the parties appeal were lost. 22 E. 4. Cor. 44.

CHAP. 37.

Of Trial by Battail.

IN (a) writs of right, and in appeals (b) that touch life, trial may be by Battail at the Defendants choice. There (c) the Demandant in a Writ of right, had need always to have his Champion ready, else he may happen to be deceived.

The battail in a writ of right must be all by Champions. Therefore in a writ of right an Infant may joyn the *Mise* and try it by battail. So can he not in an appeal, for there it must be done in proper person:

(a) *Old Na. Br. 1*
(b) *See the manner of waging battail & performing it.* 9 H. 4. 3. *in an appeal of robbery.* 17 E. 3. 2. *in an appeal of murder.*
(c) *Old N. B ib.* 9 E. 4. 35.

(a) Br. Chal. 196 which Champions must be (a) free-m
(b) 3 H. 6. 55. not villeins, and (b) so is the issue taken th
(c) Bracton. he is ready to defend it by the body of J.
a Freeman. Therefore (c) for the Lord
Westm. 1. Cap. 40 so reciteth it. offer his villein for his Champion, in a Wr
of right, or in an appeal, is a manumission
him. And the Demandants Champi
must have seen him or his Ancestors
possession, and thereof take his oath.

Statutes.

Westm. 1. cap. 40. Touching the Oath
of the Champions it is thus provided, be
cause it seldom hapened, but that the Cham
pion of the Demandant is forsworn, in th
he sweareth that he or his Father saw th
seisin of the land or his Ancestor. And tha
his Father commanded him so dereign th
right, that from henceforth the Champio
of the Demandant shall not be compelle
so to swear.

The battail in an appral must be
proper person. And therefore there th
9 E. 4. 35. Defendant is restrained from the cho
of battail, and must needs try by Jury.
there be any notorious presumption
the fact in him, as that he brake Prison,
escaped by flight being led towards Pris
1 Iff. Pl. 6. for it, or was (b) indicted for it. So in an
peal of Murder, that he was taken in th
(b) 22 E. 4. 19. act with a (c) bloody knife, in an appe
(c) 6 H. 3. Corn. 411. of Robbery, that upon fresh suite and h
and cry he was taken with the manner
havin

having some of the money about him, or of indelibility in the Plaintiff, as if he be married, or within age, &c. 22 E. 4. 29.

But against a Peer of the Realm bringing an appeal, the Defendant shall not wage battail, much less against the King, either upon an Indictment or appeal. *Discourse of the Cust. of London, fol. 13. Stam. 108.*

1 Mar. 2. cap. 6. Ousteth battail in an appeal of Rape.

CHAP. 38.

Of Trial by Witnesses.

IN a writ of dower issue taken upon the death of her husband shall be tried by witnesses. So shall no other case in the Law. 8 H. 6. 23.

CHAP. 30.

Of Trial by wager of Law.

IN some Cases also the trial shall be by the Defendants oath, which we call waging of his Law. As where the Tenant in a *præcipe quod reddat* alledgeth that he was not lawfully summoned according to the Law of the Land, and in meer personal contracts, we call them simple contracts, as (*a*) debts for money lent, or 22 H. 6. 41. (*a*) 1 H. 6. 1.

rent upon a leaſe for years of a ſtock
(*e*) 9 *E.* 4. 1. ſheep, or ſuch like: (but (*e*) not upo
leaſe of Land. And though it be of land
red with beaſts, yet the Defendant ſhall
wage his Law for the Rent due for
beaſts, for it is all but one intire contr
34 *H.* 8. *Br. ley-* detinue of a Horſe, or other perſonal th
gager 97. but not of a deed indented, or obligati
18 *E.* 4. 23. or of a leaſe for years of land, nor in an a
39 *H.* 6. 35. on upon the caſe, for it is not by reaſon
27 *H.* 8. 22. any contract growing without deed,
in debt upon ſale of a horſe for 10*l.* if
Plaintiff have a ſpecialty of it, he ſhall e
the Defendant to wage his Law. But u
detinue and Count of a Baylment by de
yet the Defendant may wage his Law,
detinue is the cauſe of the action, wh
may be diſcharged by matter *en fait*, as
Defendants re-delivery, or the Plaintiffs
king of it back again, &c. or privity of
18 *H.* 3. thers, for in detinue upon a Baylment by
nother mans hand, the Defendant may wa
his Law, becauſe he is not to anſwer to
baylment, but to the detinue. So in d
upon a contract by another mans han
But not in account upon receit by anot
mans hand, for there he muſt anſwer to
receit: the Defend. may wage his La
Therefore in ſuch kind of actions Ex
15 *E.* 4. 25. cutors are not chargeable, as in debt up
(*b*) 25 *E.* 3. 40 ſale of goods to the Teſtator, and (*b*) tho
the party have a tail enſealed of it, for t
(*c*) 11 *H.* 6. 48. is no ſpecialty: or for (*c*) wages due by
Teſtator upon a retainer. Otherwiſe it i
ſu

ich an action brought by a Labourer (who bound by Statute to serve) in (d) debt up- (d) 10 H. 6. Execut. 21.
n arrearages of an account made by the Te- tator before Auditors, (who are Judges of record) or (e) upon a lease for years, though (e) Br. Execu. 33
it be made without deed, for in none of these cases the testator could wage his Law.

Prerogative.

No wager of Law shall be against the King. Therefore in an attachment upon a prohibition the party shall not wage his law that he did sue forward contrary to the Kings prohibition, for the King is *Quodamo-do* party of the contempt. And for this cause also, debt upon a simple contract shall not be forfeit to the King by out-lawry, for then the party were in worse case then before, where he might have waged his Law. 24 E. 3. 39. 18 E. 3. 4. 50 E. 3. 5.

Statutes.

Magn. chart. cap. 28. Wager of Law shall not be admitted without credible witnesses.

5 H. 4. cap. 8. In actions of debt upon the arrearages of an accompt fayling to the same (to put the defendants from their law) that the same was found before their Apprentices or servants Auditors assigned in, shall be in the Judges discretion upon examination

mination of the Atturnies, or whom they pleaſe to receive, or ouſt the Defe ants of their Law.

3. **In plaints in Court Barons perſonal things under** 40s. yet (by p ſcription) it may be by Jury: which is gainſt the common courſe and order of la

12 H. 7. 18.

CHAP. 40.

Of Demurrers.

7 E. 6. Pl. 85.

AN Iſſue of the Law which we c a Demurrer, **is when admitting t matters alledged either of them reſt in the judgment of the Law.** T form of joyning a demurrer is, *Et, pr quer' dicit quod placitum præd. deſenſum, ſ ficiens in lege exiſtit ad ipſum*, the Plainti *ab actione ſua præd. &c. præcludn. quod ipſe ad placitum illud modo & forma placit tum neceſſe non habet, nec per legem terre tenet reſpondere, unde pro defectu ſufficient. reſpon nis petit Judicium, &c.* Et præd. def. ts ipſe ſufficient. mater in lege ad præd. quer' actione ſua præd. verſus eum habend. precludi ſuperius allegavit quam ipſe paratus eſt ver care, quam quidem mater præd. quer' non dicit, nec ad eam equaliter reſpondit, ſed ver cationem illam admittere recuſat petit judi um, & quod præd. quer' ab actione ſua pr verſus eum habend. præcludatur.

Th

This being joyned upon an exception to original it self, or count for some appearing in it, doth only drive the Defendant to make a better answer, which we call a *respondes ouster*, if it pass against him. 50 E. 3. 20.

CHAP. 41.

Of Appearance.

THus far concerning Pleading.

The other mean acts are Appearance, and Continuance, or Judicial Process.

Appearance is the parties coming into the Court. Whereupon (a) Common day given the fourth day after the very day is allowed, and so are all entries, *obtinet quarto die post*. But is it not upon a certain day given unto him, as Monday, Tuesday, or such like. (a) 12 H. 4. 24. 1 H. 6. 4. F. N. B. 25. a. 1 H. 6. ibid.

When the party for not appearing should have some great loss or corporate pain, as to have a Charter of pardon allowed where one before was out-lawed at his suite, at a *Sequatur sub suo periculo*, when if he appear not, the land is lost. in a replevin, *sicut pluries*, when a *Capias* in *Withernam* is to go against him, &c. he may appear though the officers return force him not to it, as if in the two first cases he return a 48 E. 3. 1. 7 E. 4. 15. 8 H. 6. ibid. 3 H. 6. 14.

nihil

nihil, or (that the beasts be esloined) in the latter.

8 *H.* 6. 8. 3 *H.* 6. 13. 3 *H.* 6. 50. 8 *H.* 6. *ibid.* 3 *H.* 6. 14. 10 *Ass. Pl.* 12. *in an assise.* *Old N. Br.* 46. 48 *E.* 3. 14. *Br. Som. & Sur.* 9. 7 *H.* 6. 39, 41. *Br. default.* 34. (*a*) 7 *H.* 6. *ib.* (*b*) 38 *H.* 6. 33. (*c*) 18 *E.* 4. 7. 9 *H.* 5. 5. 35 *H.* 6. 33.

If the Plaintiff will not appear the day he is demanded at the day, which is called a *non Suit*, or say in Court that he will not sue forwards, which is called a *retraxit*, and alwaies of record, this is peremptory, and loseth him his action. But in real actions brought by many, if one will not prosecute the rest may alone. Except in the writ *De nativo habendo*, that is, *favorem libertatis.*

For executors also Summons and Severance lieth in personal actions.

If the Defend. will not plead, which is *nihil dicit*, this in all actions, real and personal, is peremptory, and loseth the action.

So in personal actions if he appear and the (*a*) same term or otherwise, or (*b*) plea or (*c*) demurrer joyned make default. And this default shall never be saved how good cause soever he have to excuse as fall of waters, imprisonment, &c. for to appear and plead, and not to maintain is a kind of *nihil dicit*. But either of the parties may for once, for ones common soyne lyeth not after another without degrees be excused of appearance, by soyn which lyeth not for him that appeareth in proper person (for it is to excuse absence, whereunto his presence is contrary nor that commeth in by *exigent*, or *Capias* (for he abideth in ward, or by main and therefore cannot make default) if

n eſſoyne, that is to ſay, demand it the 18 E. 4. 4.
day, or any of the four days, unleſs
other caſt an exception, that is to ſay,
an exception that no eſſoyne be re-
ed. And the fourth day the eſſoyn muſt
be allowed (and then it is ſaid to be
dged and adjourned) or diſallowed.
upon every mean appearance a new
oyn lieth, (a) though one were caſt be- (a) 27 H. 6. 2.
(for the Plaintiff and the Defendant if 21 E. 4. 16.
y liſt, may fourch infinitely by the Com-
n Law.) As after iſſue upon a cuſtom ba- 39 H. 6. 29.
dy, or *ne unque accomple en loyal matrimo-*
, at the day of the certifying the Defend.
caſt an eſſoyn: after eſſoyn of the De-
nd. if the Tenant at the ſecond day be
oyned, and at the third day demand the
, and hath it. Now at the day after the 27 H. 6. 2.
, he may be eſſoyned again, and at the
after that the Demand. upon a wager of
in debt, and day given to do it, if the
intiff be eſſoyned at the day, and at the
given by the eſſoyn the Defendant be eſ-
ed, now the Plaintiff at the day may
eſſoyned again.

And this is called *eſſoyn de malt venir*, or
common eſſoine. Beſide which eſ-
ns for ſpecial cauſes, as of being beyond
going *ad terram ſanctam*, of the Kings
ice, and *de malo lecti* are allowed. And
(a) a year and a days adjournment, (a) 27 H. 6. 1.
upon an (b) oath muſt be taken that (b) 2 E. 4. 16.
cauſe is true.

But no ſuch ſpecial eſſoine lieth in an
aſſiſe

(c) 21 H. 6. 42. assise (c) of novel disseisin, (d) dower,
(d) 44 E. 3. 15. assise of darrein presentment, and
(e) 27 H. 6. 1. *impedit*, for then the six months would
and so the Church come in Lapse, for
essoins must have a year and a days adjou
ment. But a common essoyne lyeth in
those cases.

Statutes.

West. 2. cap. 12. In an appeal of
death of a man no essoyne shall lye for
Appellor, for whatsoever cause, in whats
ever Court the appeal be.

Westm. 1. cap. 41. In assises and
utrum after that the Tenant hath once
peared, he shall be no more essoyned.

Westm. 2. cap. 28. In like manner
shall be touching Demandants in an assise.

Westm. 1. cap. 42. Parceners and
tenants in a *præcipe* against them shall
but one essoyne,

Glocest. cap. 10. So of a man and
wife impleaded in the Kings Courts.

9 E. 3. cap. 3. Stat. 1. In a Writ
Debt against Executors, they nor any
them shall have but one essoyne before
pearance, that is to say, the summons or
tachment, nor but one after appearance.

Westm. 2. cap. 27. None allowed
the day given by *Præs partium*, in
where the parties consent to come with
essoyne.

Marleb. cap. 13. After a man hath
his

himself upon an inquest, he shall have but one essoin.

Westm. 2. cap. 27. After one hath put himself upon an inquest, an essoyne shall be allowed him at the next day, but never after, whether he were essoyned or not.

Mar. cap. 19. None shall need to swear to warrant his essoyne.

West. 1. cap. 43. The Demandant may aver against an essoyne (before Justices) of being beyond Sea, that the Tenant was within the four Seas the day that he was summoned, and three weeks after.

Westm. 2. cap. 17. In an essoyne *De malo lecti*, the Demandant may aver by inquest that the tenant is not sick, nor in such plight, but he may come before the Justices. Such an essoyne shall not lye in a writ of right between two claiming by one descent.

5 E. 3. cap. 7. Essoyne of the Kings service, nor protection shall not be allowed in writs of attaint.

12 E. 2. Stat. of essoynes. See many particular cases where essoynes lye not.

CHAP. 42.

Of Continuance.

COntinuance is from day to day till the end of the Suit, else (4) if the Plaintiff do nothing, it is called a discontinuance: if an error be in the continuing

(4) 54 E. 3. 48. 11 H. 7. 5.

nuing, as by awarding a *capias* where a diſtreſs ſhould be, it is called a miſcontinuance.

Statutes.

21 H. 3. *De anno Biſſextili.* The day increaſing in the leap-year ſhall be reckoned of the ſame month wherein it groweth, and that and the day going before ſhall be accounted for one day.

51 H. 3. *Dies communes in Banco.* Daies ſhall be given in writs nine returns, as coming in *Michaelmas* Term, from *Octab. Mich.* to *Octab. Hillarii*, &c.

51 H. 3. *Dies communes in Banco*, and 32 H. 8. cap. 21. Common days ſhall be given in real actions nine returns. In Writs of dower five returns.

Marleb. cap. 12. In dower *unde nihil habet*, four or ſix daies ſhall be given in the year.

In Aſſiſes of Darrein preſentment, and *Quare impedit*, from fifteen to fifteen daies, or from three weeks to three weeks, as the place ſhall be near or far.

5 E. 3. cap. 6. and 7. In an attaint ſix daies ſhall be given at the leaſt.

3 H. 6. 40. *Little.* The ſute of an excommunicated perſon ſhall be put without day, term paroll nor Jour till he be abſolved. And ſo is it in all other caſes which happen without the Plaintiffs folly, as by the demiſe of the King,

King, (so we call the death of the King, because in Law he never dieth, but leaveth his Crown to another) *non venuunt.* of the Justices, ceston of the eyer, protection, &c.

Statutes.

1 E. 6. cap. 7. By the death of the King no action, sute, bill or plaint shall be discontinued, or put without day. But the process, pleas, demurrers, continuances, shall stand good, and be prosecuted in such manner and form, as if the same King had lived. **After continuance taken, the Defendant may for once leave his former plea, and plead any thing growing since this latter continuance,** which we call a plea *puis darrein continuance.* As if the Defendant in an action of account plead receit of parcel by the Plaintiff who wageth his Law: now at the day which the Plaintiff hath to perform his Law, the Defendant may plead a release *puis darrein continuance.* 21 E. 3. 49.

Continuance is by process, or upon the Roll. That upon the Roll is a *Dies datus* **a emparlance** *Dies datus* **when the Court giveth the parties day,** and therefore in a personal action the Defendant shall not be condemned by default after such a continuance: for it is the act of the Court, and he doth not demand day as upon an Emparlance. and this **is always before the Count.** 21 E. 4. 16. 7 H. 6. 39. 41 Er. *default.* 34. 18 H. 8. 6.

Such a continuance by assent of both the parties is called a *Præct partium.* 41 E. 3. 1.

Br. Contin. 14. So as if the Defendant come upon the *exigent* by a *reddit se*, and be by mainprise, yet the Plaintiff may have day by *prece partium*, notwithstanding that thereby the Defendant shall be let out of ward, for it is by assent of the parties.

22 *H.* 6. 12. But in assises the continuance is by a *Justiciarii nondum avisantur*, and not by a *Dies datus*.

7 *H* 6. *ibid.* Emparlance is when the Defend. demandeth day to see if he may end the matter without further sute, which he may do once, but not oftner without the plaintiffs consent: and is always after the Count.

8 *H.* 8. 6. After which he cannot plead to the Jurisdiction, person, or in abatement either of the Count or writ For (*a*) after emparlance a *Supersedeas* of priviledge out of the Chancery shall not be allowed: he cannot plead that the Land is within the five ports or ancient demesne, &c. or that the Plaintiff is a villein, or (*d*) outlawry in the Plaintiff in debt upon a simple contract, or in trespas of battery or false imprisonment. (But in debt upon an obligation he may, for that is in the action, inasmuch as the King is to have the debt) or that the Plaintiff is an alien, *viz.* to the person in an action of trespas to his house broken down, but to the action he may: Nor misnomer as no such Town of *D.* where he is named *J. S.* of *D.* But where a *præcipe quod reddat* is brought of the Manor of *D.* in *D.* there he may, for there it is in bar, or in an action of debt against

(*a*) 22 *H.* 6. 7.

(*d*) 4 *H.* 6. 67.
16 *E.* 4. 4.
32 *H.* 6. 33.
13 *H.* 7. 17.
32 *H.* 6. 27.

againſt an Executor that he is an adminiſtrator, and not an Executor. But that he never was Executor, never adminiſtred as Executor he may, for that is to the action, nor demand oper of the obligation, or ſuch like, but he may plead variance after, and ſo come to have a view of the Obligation and Condition thereof, whereby to plead any matter in bar. 4 H. 7. 10.

But after a ſpecial imparlance *Salvis omnibus advantagiis*, he may plead to the Count or writ and habe oper, but yet not in that caſe plead to the Juriſdiction or perſon. 4 H. 6. 67. Br. Contin. 6.

In an appeal of Robbery, or ſuch like, that toucheth life, if the Defend. plead a plea whereby his life ſhould come in jeopardy, the Plaintiff ſhall not imparle unto it, but muſt anſwer *Sedente curia*. 22 E. 4. 19.

Default after imparlance, that is, at the day given by the imparlance is peremptory, and loſeth the action in all actions whatſoever, real or perſonal, for it is a departure in deſpight of the Court. As in debt, treſpaſs, or ſuch like, the Plaintiff in this caſe ſhall recover his damages in a *præcipe quod reddat*, if the Tenant appear and imparle, and after make default, ſeiſin of the Land ſhall be awarded, and not a *petit cape*. In a writ of right if the tenant vouch, and the vouchee enter into the warranty and imparle, and after make default, the Demandant ſhall recover ſeiſin of the Land againſt the 38 H. 6. 33. 1 H. 7. 11. Br. default. 34. 39 H 6. 16. 38 H. 6. 33.

tenant, and the Tenant over in value against the vouchee.

CHAP. 43.

Of Meſne, Judicial proceſs.

Judicial Proc. is a Proc. out of that Court where the original is returned proſecuting the action. And therefore upon an original returned *tarde*, an *alias* and *pluries* ſhall go out of the ſame Court *Teſte* the chief Juſtice, for by the return the Court is poſſeſſed. But if no return at all be made, the *alias* and *plaries* ſhall go out of the Chancery, *Teſte Regem*. This muſt be ſealed with a ſeal Judicial, being in the cuſtody of the Chief Juſtice of that Court.

22 *El. Dy.*

Judicial Proceſs are meſne Proceſs, or in nature of new originals.

Meſne Proc. which is for any neceſſary act to be done, not only for the Plain. againſt the Def. but for either of them againſt any other, whoſe preſence in the Court may be neceſſary for them. As againſt one that is vouched or prayed in aid of. So againſt Juries, Witneſſes, &c. So to execute judgments given, or any thing elſe neceſſary for the trial of any of their allegations.

2 *H.* 6. 4.

Old N. B. 171.

Upon a fine levied before it be engroſſed the Writs to compell atturnm. are *per*

qua

que Servicia, when the fine is levied of a seigniory. *Old N. B.* 170.

Quem reddicum reddit, when it is of a rent-charge, or rentseek. *Old N. B.* 170.

Quid juris clamat, when it is of a reversion or remainder. *Old N. B.* 168.

Statutes.

23 Eliz. cap. 3. The entry of record of an Attornment upon a fine shall be utterly void, except the party (mentioned to attorn) first have appeared in Court in person, or by attorny warranted by the hand of one of the Justices of one Bench or other, or of one Justice of assise, upon a writ of *Quid juris clamat*, *quam redditum reddit* or *per que servicia*, as the case requireth.

In petitions, whether in Parliament, or elsewhere, and though the King have granted the lands over, or wheresoever the King being made party, may be at loss: as when he is prayed in aid of, in a *præcipe quod reddat*, or other real action against his lessee, but not in (*b*) trespass (*c*) *Ejectione firmæ*, or other (*d*) personal action, for there he is to lose nothing. A writ of search lyeth, which is to search in the treasury before the plea proceed, if by likelihood some matter may be there to maintain his title. As upon finding by office that *A.* died seised (of certain Land holden of the King) without heir, and a traverse put in that *A.* held not of the King. But if one come and say that *A.* had issue *B.* who enfeoffed him, there no *Stam. prær.* 73.

(*b*) 27 H. 8. 28.
(*c*) 15 *Dy.* 320
(*d*) 27 H. 8. *ib.*

ſearch ſhall be, for no matter can be in the treaſury, to prove whether *A.* had iſſue, no more if the Kings title be by an alienation in mortmain.

Statutes.

14 E. 3. c. 14. In a petition and ſearch granted after four writs, whether any imminent or remembrance be found for the King, or not, the party ſhall be put to anſwer. So as every of the four writs be delivered to the Treaſurer and Chamberlains forty days before the day of the return.

33 H. 6. 33 8 E. 4. 4. *for the D'murrer.* 38 H. 6. *ibid.*

In real *præcipes* where a free-hold is to be recovered on default, after plea, iſſue, or demurrer a petty *Cape* ſhall go forth in the nature of a grand *Cape* in all things, ſave that here the Tenant is to anſwer the default only, not to the demand alſo, as in a grand *Cape*. And therefore it is called a petty *Cape*, and the other a grand *Cape* becauſe there is a leſs in the one than in the other.

Old N. B. 179. (a) 2 H. 4. (b) 42 H. 4. 1. (c) Old N.B. 71 (d) 30 H. 6. 8. 30 H. 6. *ibid.*

So upon a voucher a *petit Cape advalentiam*. In thoſe that are for other hereditaments, not in point of ſeigniory, as (a) annuity, (b) *Quare Impedit*, *Quo jure* (c) *quod permittat*, &c. upon default as before, a diſtreſs ſhall go forth in lieu of a *petit Cape*. And both there, and upon view granted, day ſhall be given as in a plea of Land, for it is in the nature of a *præcipe quod reddat*, in as much as hereby he is to recover the land it ſelf.

The Proceſs againſt Jurors is firſt

a

a *Venire facias* to the Sheriff to return them, at which day if they appear not, then a *habeas Corpora*. *Old N. Br.* 171

And after that a diſtreſs infinite.

Statutes.

27 Eliz. cap. 7. No Juror ſhall be returned without the true addition of the place of his dwelling at the time of the return, or a year before, or ſome other addition whereby he might be known, nor no eſtrete ſhall be without ſuch addition as is in the return.

35 H. 8. cap. 6. In every *Habeas corpora* or *diſtringas* with a *Niſi prius* at the firſt writ, 5 s. at the leaſt ſhall be returned in iſſues upon every Juror, at the ſecond 10 s. at the leaſt, at the third 13 s. 4d. and ever afterwards the double of 13 s. 4d.

2 E. 6. cap. 32. If the principal Jury appear not fully at the *niſi prius*, thoſe that make default, ſhall forfeit their iſſues, though the Jury be made up *de circumſtantibus*. (a) *Br. default* 58.

Where in perſonal actions upon the defendants default, the Jury ſhall be taken (b) 34 H. 6. 24. which we call taking of the Jury by default: 2 H. 4.

In an action of treſpaſs always (a) whatſoever the iſſue be, (b) releaſe (c) Juſtification, &c. So in (d) debt, detinue, (e) account, & the reſt, which are for things in certain= *Br. enq. de dam.* 11. (c) 9 H. 5. 15. (d) 5 E. 4. 6. 1 H. 7. 1.

tainty, if the iſſue be taken upon a matter *en fait* only, as (*e*) payment, or that an (*f*) acquittance pleaded in bar by the Defendant was made by *dures*. But if it be upon the acquittance it ſelf, releaſe or other matter in writing, the Plaintiff may there pray judgment if he will. But if he do not pray it, the Jury ſhall be taken by default, as in an action of Treſpaſs.

(*e*) 1. H. 7. 1.
(*f*) 9 H. 5. 13. 42 E. 3. 1.

The form of all theſe writs. Old N. Br. 106. in an aſſiſe of novel diſſeiſin, and 25. in darrein preſentment

But in aſſiſes of novel diſſeiſin, nuſance, mortdanceſtor, darrein preſentm. and *juris utrum*, the original writ commandeth a Jury, as well as the Defendant, to be warned which Summons to the Jury ſerveth inſtead of a *venire facias*. So that the proceſs here againſt the Jury is, *Sanas habeas corpora & Diſtringas*.

And therefore thereupon default after that original proceſs ended, *viz.* the Attachment in an aſſiſe of novel diſſeiſin, and nuſance, the ſummons and re-ſummons in a (*g*) mortdanceſtor, darrein preſentment, and (*k*) *Juris utrum*, the inqueſt ſhall be taken by default, whether the default be preſently after the reſummons, or after eſſoin, or plea pleaded. As it ſhould be taken if the Tenant did appear.

(*g*) F. N. B. 196 *g*
(*h*) F. N. B. 50. *k*.

CHAP.

CHAP. 44.

Of Judicial proceſs in the nature of new Originals.

JUdicial Proceſs in the nature of new Originals (in none of which any freeholder ſhall ever be recovered) but damages only, are theſe that follow. First ſuch as command to do ſomething, as, 1 Re-ſummons or Re-attachm. according as a Summons or Attachment lay in the firſt action, to receive in the former ſuit a ſute put without day. And may either revive the original alone, or the whole proceeding by ſpecial words, in that Reſummons or Attachment, as if it be againſt the Tenant after a voucher, the voucher is not received, unleſs ſpecial mention be of the vouchee alſo, nor any plea at all is revived but the original only. But in every Reſummons after an iſſue, the iſſue is revived for day is given to the Jurors expreſly: So is all the pleading by a ſpecial Reſummons, but no ſuch Reſummons, nor Reattachment ſhall be upon a diſcontinuance, though it be in a Writ of Ward, where a Reſummons is given by the Statute, for upon a diſcontinuance the Original is determined. 17 E. 3. 76. 5 H. 7. 40. 24 E. 3. 48. Br. reſum. 33.

F. N. B. 14. 2 **Ill certificatory writs**, as if in a writ of right close brought in antient demesne the tenant vouch a Foreigner to warranty, and after purchase a *Warrantia charta* returnable in the Common place against the vouchee, and thereupon a *Superſedeas* to the Bayliff in antient demesne. Now if the plea of *warrantia charta* be determined or discontinued in the Common place, the Demandant in the Writ of right close may sue a Writ out of the Chancery, directed to the Justices of the Common place, to certifie the King in his Chancery of it. To the end that if it be so, the Bayliff in antient demesne may proceed. So upon a *Monſtraverunt* sued against the Lord in antient demesne and an attachment thereupon, because he shall not be driven to answer to the attachment till the Court be ascertained whether the lands be antient demesne, or no: the Plaintiffs in the *Monſtraverunt* may sue a special writ to the Treasurer, and Chamberlains of the Exchequer to certifie it. In like sort upon an *Indicavit* purchased, because the Tythes amount to the fourth part of the value of the Church, the other may have the Kings Writ directed to the Bishop to certifie the King in the Chancery of the value of the Church, to the end that if it amount not to that value, he may have a consultation. So upon Surmise made in the Chancery, that the Kings Committee of ward hath done waste, a writ shall go forth to the Eschetor to certifie the King thereof.

F. N. B. 16. c.

F. N. B. 52.

F. N. B. 59. b.

And

and ſo in all other like caſes.

3 *Certiorari* **to remove a Record** out of the Court of Record **into the Chancery**, for no Record ſhall be removed into the Common place, nor no indictment taken in the Countrey into the Kings Bench immediately by any *Certiorari*, but firſt it muſt be certified into the Chancery by a ſurmiſe, and from thence ſent into the Common place, or Kings Bench, as the caſe is, by a *Mittimus*. And every writ of Error is a *Certiorari* in it ſelf. 36 H. 8 Br. Certior. 20. 12 E. 4. 11.

4 **To remove ſuits out of Court Warrants**, for a *Recordare*, *Pone*, or ſuch like, are to no other intent but only to remove ſomewhat into the Kings Court, and are in the nature of a *Certiorari*. And upon the remove the *recordare* or *pone* is determined, for the plea ſhall not be holden upon them, but upon the plaint that is removed, and the firſt pledges ſhall ſtand. **And theſe may be without ſhewing any cauſe in the writ, if ſo remove be at the Plaintiffs ſute: but not without ſhewing good cauſe in the writ, if it be at the Defendants ſute.** As being to remove a plea in a writ of right to ſhew that the Bailiff is heir to the Land, or maketh upon him to maintain the matter to have part of the Land, or that the Tenant hath alledged baſtardy, or pleaded a foreign plea, or joyned the miſe upon the grand aſſiſe, &c. being to remove a plea in replevin, by plaint, to ſhew that the Defendant avoweth for damage feſant, and the 3 H. 6. 3. Fitz. N. B. 4. b. Fit. N. B. 70. b.

the Plaintiff justifieth by reason of Common of pasture, which is a plea touching Free-hold, and therefore should not be without Writ.

These are either to remove pleas by writ, or by plaint without writ. **Of the first sort are a Tolt and Pone.**

Old N. B. 2. *Fit. N. B. 4. a.* *Tolt* or *Tollas* **is for the Plaintiff,** but never for the Tenant **to remove a writ of right out of the Lords Court into the County Court.** And because this being at

Old N. B. ibid. the Plaintiffs sute may be without any cause, therefore this clause is put in every writ of right patent, *Et nisi fecerit vice comes faciat.* *Pone* **is to remove into the Common place in all other cases,** *viz.* (*b*) save only in the case of a writ of right to be removed out of the Lords Court into the County Court. As (*c*) writs of right removed into the County Court by a *Tolt* (*d*) *Justicies* and *Vicontiel* Writs in the County Court, replevins by Writ either (*e*) there or (*f*) in any other Court Baron. And all this indifferently (*g*) either at the Plaintiffs or at the Defendants sute. So upon a (*h*) *nativo habendo* sued in the County, if the Defendant alledg himself frank, the Lord is driven to remove it by a *pone*. **But a pone to remove a replevin by writ out of any other Court Baron then the County Court, cannot be without shewing cause,** though it be at the Plaintiffs sute.

(*b*) F.N.B. 4. *b. e*
(*c*) F.N.B. *ibid.*
(*d*) F.N.B. 125. *f* *In admeas. of pasture.*
(*e*) F.N.B. 69. *m.*
(*f*) F.N.B. 70. *a*
(*g*) F.N.B. 69. *m* & 70. *a. in a replev.* & 125. *f* *in admeas. of pasture.*
Old N. B. 2. in a writ of right.
(*h*) F.N.B. 77. *e.*

Of the second sort are a *Recordare*, and

3 H. 6. 30. *Accidas ad Curiam.* **In both which nothing but**

e the plaint shall be removed (a) though they be at issue. (a) F.N.B. ibid

Recordare (b) is to remove plaints in County Courts. Every (c) Writ of false judgment upon a judgment given in the County Court is a *Recordare* in it self. (b) F.N.B. 70. b. (c) F. N. B. 18. a. b.

Accedas ad curiam, is to remove plaints in any other Court Baron. (d) Every writ of false judgment upon judgment given in any other Court Baron then the County Court, is an *Accedas ad Curiam* in it self. F. N. Br. 70. b. & 18. d. (d) F.N.B. 18. a

This also upon good cause shewed in the Writ, I pray for the Tenant to remove the plea in a writ of right out of the Lords Court immediately into the Common place. F. Nat. Br. 4. a.

5 *Mittimus* to send a record out of the Chancery, whether being certified thither before by a *Certiorari*, or howsoever else being there into another Court of Record, to the end they may proceed upon it. But the Chancellor may send such a Record by his own hands, without any *Mittimus*, if it please him. F. N. B. 22. g.

6 *Procedendo* to proceed in suites. As if the Lord upon a Writ of right sued in his Court will not hold his Court, the Demandant may have this Writ unto him, if a man cause himself to be essoyned of the Kings service in any action where indeed he is not in his service, the Plaintiff or Demandant may have this Writ directed to the Justices commanding them to proceed. So where the Justices in any Court delay the Plaint. or the F. N. B. 3. c. F. N. B. 17. h. F. N. B. 24.

the Defendant, and will not give judgment for him where they ought to do it, the party grieved ſhall have a *procedendo ad judicium*.

Old N. B. 32. **Of this nature is a writ of conſultation to proceed in the Spiritual Court, when one ſuing there for matters belonging to that Court,** as for matters teſtamentary, or concerning Matrimony, &c. is by a prohibition **reſtrained to proſecute the ſuit.**

Statutes.

24 E. 1. *De conſultatione.* A Conſultation to be awarded by the Chancellor or Chief Juſtice of the King, upon ſight of the Libel at the inſtance of the Plaintiff.

50 E. 3. c. 4. Upon a conſultation once duly granted, the Eccleſiaſtical Judge may proceed in the ſame cauſe notwithſtanding any other prohibition. So the matter of the Libel be not enlarged, nor otherwiſe changed.

P. V. B. 249. g. 7 **A writ of Mainprize to ſet at liberty one bailable finding bayl,** that is to ſay, ſufficient perſons to be bound for him a ſurety **to anſwer the action,** which in reſpect of delivering him into the hands of his friends the Suretie is called Bayl, in reſpect of their taking of him is called Mainprize.

4 E. 6. Pl. 67. **Such perſons baylable be they which are taken upon a** *Capias* **original.**

But

But not the Defendant in (a) appeal of Maym, if the Maym be haynous: nor principal in an indictment or appeal of Felony, (c) nor the accessary after attainder of the principal (d) nor any in high Treason, where all be principals.

(a) 6 H. 7. 1. c. weſt. 1. c. 15. Stam. 71. & 72. In caſe of the death of a man.
(c) Stam. ibid.
(d) Div. of Courts fol.

Statutts.

Weſtm. 1. cap. 15. Such as are accuſed of receipt of Felons of commandment, or force, or of aid in Felony done, and a man appealed by approver, after the death of the prover (if he be no common Thief, or defamed) ſhall be let out of priſon by ſurety.

8 Recaption is for him whoſe goods being diſtreined before for rent or ſervice, but not for damage feaſant: for there moſt as they are found upon ones Land, it is lawful to diſtrein them. For every time is a new wrong, and a new treſpaſs, are diſtreined again for the ſame thing, hanging the plea in the County Court, or before the Juſtices. Though the firſt diſtreſs were lawful, and though the rent or ſervice were behind again, or not: for by the firſt diſtreſs he ſhall have a return till he be ſatisfied of all. And here the goods diſtreyned, muſt be the ſame parties goods. For if the Lord firſt diſtreined his Tenant, and after the beaſts of a ſtranger, no recaption lyeth. But upon a diſtreſs of two mens beaſts firſt, and after the beaſts of one,

FNB. 71. c. Fit. ibid.
Fit. ibid. 72. g. Fit. ib. 72. b. & 71. c.
Fit. ib. 71. b. Fit. ib. 71. i.

Fit. ibid. 71. *e.* one, it lyeth for that one: ſo upon a diſtreſs
Fit. ibid. 71. *f.* of beaſts which a man hath in common with another, and after of ſuch beaſts as are his own alone. Alſo he that taketh the ſecond diſtreſs muſt be the ſame party that diſtrained firſt: as if the Lord diſtrained firſt, and then his ſervant or Bayliff diſtreineth again by his commandment, or without his commandment, if he agree afterwards to it, as by joyning with his Servant or Bayliff when they pray in aid of him. Otherwiſe not, though the Bayliff make coniſance in his right: for it may be he hath no notice of it: and the party hath remedy againſt the Bayliff if by an action of treſpaſs. But this writ lyeth not
Fit. ibid. 71. *d.* after *Non Sutes* in the replevin, becauſe there the plea is not hanging: but before avowry in the replevin it doth, for the Plaintiff in the recaption may well count that the Defendant took them for the ſame cauſe: And that may make a good iſſue, which the Inqueſt may take notice of well enough
Fit. ibid. 73. *e.* by the evidence of the parties. But upon a Replevin ſued by plaint or writ in a Franchiſe, and not before the Sheriff or the Kings Juſtices, no recaption lyeth, though he be diſtreined by the ſame party again, and for the ſame cauſe, for the King will not direct this writ but to the Sheriff. But if the ſute be removed before the Juſtices by a *Pone* or *Recordare*, there a recaption lyeth as well for a diſtreſs before the *Pone* or *Recordare*, as afterwards. And here the Plaintiff

riff shall recover damages for the second taking only, because it is a contempt against Law, for which the Defendant shall be fined if he be convict before the Justices, or amerced, if the conviction be before the Sheriff, but shall recover no damages for the taking nor the detaining of the beasts. And therefore here the Defendant shall not make avowry, as he should in a Replevin, but only may justifie the taking, as in an action of Trespass.

9 A Writ *De magna assisa eligenda* to the Sher. to summon four Knights to choose the grand Assise, when the mise is joyned thereupon in a Writ of Right. *Fit. N.B. 4. f.*

And this is a meer judicial Writ issuing out of the Common place when the plea hangeth there. But when the plea is in the Lords Court, or in the County Court, then it is an original writ out of the Chancery.

10 A Certificate *De Assise* upon a verdict given in an assise that is not perfect, whether not well examined by the justices, or not fully inquired of by the Jury, to bring in the same Jurors to give a more perfect one. And this must be sued in the same County where the assise was sued, and may be as well before other Justices, as those that took the assise: if the Kings Bench, or Common place be in the County where the Assise passed, then this writ may be sued there. *7 E. 6. Pl. 85.* *F.N.Br. 181. a.*

Fit. ibid. d. And beſide the writ it ſelf directeth to the Sheriff, the Juſtices muſt have a Patent made unto them as in the aſſiſe it ſelf.

F. N. B. 77. *t.* 2 *El. Dy.* 173. 11 *Proprietate Probanda* unto the Sheriff to inquire whether the property be in the Plaintiff or Defendant, when upon a replevin ſued, the Defendant claimeth property, which determineth the Sheriffs power to make Replevin.

2 *Eliz. ibid.* (a) 1 *E.* 4 9. (b) 2 *El. ibid.* And this alſo may be meer judicial iſſuing out of the Kings Bench (*a*) or Common place, (*b*) and returnable there.

F. N. B. 163. *d.* *Old N. B.* 30. *Old N. B.* 28. Secondly hither belong thoſe that be prohibitory, or reſtrain from doing ſomething where the prohibition it ſelf is in lieu of a Sum. And after that the proceſs is an attachm. and diſtreſs. So in every writ which is on a prohibition broken, as a *quare non admiſit*, *quare incumbravit*: for every breach of prohibitiō is a contempt in it ſelf.

Of this ſort are

(a) *Old N.B.* 30. (b) 22 *E.* 4. *conſ.* 2. 1 Prohibitions to reſtrain the party from ſuing in an inferior Court, that ought not to hold plea of it: As in the ſpiritual Court, for (*a*) any plea that concerneth not matrimony and wills, as for goods or debts, &c. and (*b*) though it be of matters for which the Plaintiffs have no remedy by the Common Law, as of a Covenant broken without ſpecialty, or debt, &c. againſt executors upon a ſimple contract made by their Teſtator. Or *Pro læſione fidei* againſt one which hath waged his Law in

in an action of debt upon a ſimple contract and ſworn falſly. So if the Bayliff in a Court Baron hold plea of matter above xls. the Defendant may have a prohibition. And theſe prohibitions may be directed to the Judge himſelf, not to hold plea in thoſe caſes, as well as to the Sheriff, to reſtrain the party from ſuing. 19 *H.* 6. *Old N. B.* 31. *F. N. B. Ph.*

Such a prohibition is an *Indicavit* for the Def. patron when the right of avowſon of any part of ones tythes is in demand in the ſpiritual Court, between two Clerks claiming from ſeveral patrons. So as the *Indicavit* is alway between four perſons, whereof two are patrons, and the other two Clerks. One claiming to hold of the avowſon of one patron, the other of the other patron, for an avowſon being a lay hereditament, whereſoever the patronage ſhould come in queſtion the Common Law is to decide it: But where that is not to come in queſtion, the Spiritual Court ſhall decide it, by ſuit in that Court called ſpoliation. As a perſon accepting another Benefice, or created a Biſhop, and having a diſpenſation to keep his perſonage, ſhall have a ſpoliation in Court Chriſtian againſt another *Incumbent* preſented by the patron, and then ſhall come in debate whether they have plurality or diſpenſation, or no. 12 *E.* 4. 13. *Fit. N. B.* 36.

And this *Indicavit* lyeth though it be but the right of the twentieth or thirtieth part of tythes that is in demand, for at the 38 *H.* 6. 20.

Common Law, the Court Chriſtian had no power to hold plea of any part of diſmes, but a prohibition lay till the Statute of **Weſtm. 2. cap. 5.** which will have an *Indicavit* to be of tythes to the value of the fourth part of the Church at leaſt. But before that, it might have been of the twentieth part, and the patron thereupon might had a writ of right, whereupon at the Common Law there was a writ of the avowſon of the tythes of v acres or x acres, or one acre. But now ſince by the ſame Statute an *Indicavit* ſhall not be granted of leſs then the fourth part, therefore there is a writ of the avowſon of the tythes of the fourth or third part. But at the Common Law there was no ſuch writ.

Statutts.

Weſtm. 2. cap. 5. When the Parſon of any Church is diſturbed to demand tythes in the next Pariſh by a writ of *Indicavit*, the patron of the Parſon ſo diſturbed ſhall have a writ to demand the avowſon of thoſe tythes. And after the Plea deraigned in the Kings Court, then it ſhall proceed in the Court Chriſtian.

18 E. 3. cap. 7. *pro clero* **& c. 47.** Writs of *Scire facias* to anſwer of diſmes in the Chancery, and to ſhew why ſuch diſmes ought not to be reſtored the Demandans ſhall not from henceforth be granted. Saving the Kings right as he and his anceſtors

flors were wont to have.

2. A *Supersedeas* to stay any further proceeding in the suit. As if a writ of Trespass *vi & armis* be brought in a Court Baron, if upon a writ of right close brought in antient demesne, the demandant and tenant put themselves upon the grand assise, or the Tenant vouch a foreynor, or plea a forein plea which cannot be tried there, if a Clerk of the Chancery or any of the servants of the Chancellor, or Lord Keeper of the great Seal be sued in any other place for a trespass or other matter.

F. N. B. 239. *d.*
F. N. Br. 13. *g.*
F. N. B. 48. *h.*

Of this nature are, a writ of peace for the Tenant upon a writ of right brought in the Lords Court, vouching one to warranty out of the power of that Court, we call it a foreign voucher, or joyning the mise upon the grand assise to have the matter respited till the Justices in Eyer come thither, which if he bring not at the next Court day, after such voucher or mise joyned, he loseth his tenancy, the reason is, because the Lord cannot make a grand assise to come. But if battail be joyned, that shall be determined there, and after such a writ brought the plea may proceed by leave of the Justices. As if the vouchee come before them and enter into warranty, they may award that he shall go to the Court of the Lord and there warrant to the party that vouched him, and assign a day certain of the Court, and also give leave and power to the Lord to hold his Court.

13 *E.* 3. *vouch* 269.
c E. 1. *droit.* 45.
c E. 1. *ibid.*
c E. 1. *ibid.*
13 *E.* 3. *ibid.*

De libertate probanda for the Defendant upon a *Nativo habendo* ſued in the County, claiming to be frank to the Sheriff to adjourn the plea before Juſtices in Eir. And therefore muſt be brought before any *pone* delivered by the Lord to the Sheriff to remove it. And this is a *Superſedeas* to the Lord not to proceed till the day of adjournment, nor to ceiſe the villein, till the plea diſcuſſed.

F. N. B. 77. f.

Old N. B. 46.

Statutes.

25 E. 3. c. 18. The Lord may ſeiſe the bodie of his villein, notwithſtanding that a Writ *De libertate probanda* be hanging.

Idemptitate nominis for one moleſted by a ſute againſt another of the ſame name. As if he be taken by a *Capias* or *Exigent* awarded againſt the other, or diſtreined by proceſs out of the Exchequer. And this Writ ſhall be either to the Eſcheator or Sheriff according as he is vexed, or his goods taken by either of them, to ſurceaſe againſt him, or againſt his goods.

F. N. B. 267. e.

3. Protections *cum clauſula volumus*, when the King in reſpect of the Defendant being in his ſervice taketh him, for the Plaintiff can never have a protection from him, unleſs it be in ſpecial cauſes where the Pl. doth become Defendant, into his protection for one year to be free from all ſuits.

F. N. B. 28. g.

39 H. 6. 38.

Writs

Writs of dower, *Quare impedit*, assises of novel disseisin, and pleas before the Justices in Eyer are accepted. Therefore it shall for that time save all defaults. So as upon a protection (cast in a plea personal) at the *Nisi prius*, and repealed at the day in Bank, yet the inquest shall not be taken by default, for the default was once saved. Otherwise it is of a protection disallowed at the day in Bank. And a man may excuse his fault at a *Grand cape*, or *petit cape* by casting of a protection. But a protection can indure no longer than for one year, for otherwise it might be for xx. xxx. or C. years, and by the same reason for a thousand years, which were a great inconvenience and disherison to the party. But a protection for one year is not so, for after the year ended he may have a resummons and proceed in his suit: yet the King after the first year ended may take him again into his protection for another year, though it be space of ten or twenty years together, for in that case appeareth at the first no mischief nor inconvenience, as there doth when he taketh him into his protection for so many years at once.

Old N. B. 21. 39 *H.* 6. *ibid.* 21 *H.* 6. 20. *Fit. N. B.* 29. *b* 39 *H.* 6. *ibid.*

Statutes.

5 *E.* 3. cap. 7. No protection shall be allowed in Writs of Attaint. 39 *H.* 6 38.

This kind of protection is double. *Protectio quia profecturus*, when he is to go be-

pond ſea in the Kings buſineſs.

F. N. B. 28. t. *Protectio quia moratur*, when he ſtayeth there about it. Of which nature is alſo a protection *quia in priſona*, when being ſent beyond Sea in the Kings warres he is there taken and detained in priſon. The

F. N. B. 28. g. 39 H. 6. 39. going or ſtaying about the Kings buſineſs in the marches of Scotland, or ſuch like places as is counted as beyond Sea. But a Protection, *quia moratur ſuper altum mare*, is not good, for it cannot be intended that he doth abide there.

Statutes.

13 Rich. 2. cap. 6. A protection in reſpect of going beyond the Sea diſallowed (except it be in voyage Royal, or buſineſs of the Realm) where it beareth date after the ſute commenced. And the Lord Chancellor hath authority to appeal it, if he go not in convenient time, when he returneth.

A Stat. of protection, 33 E. 1. Averment is given againſt petition for the Kings ſervice.

1 Ric. 2. cap. 8. Protection (*volumus*) not allowable for victual taken or brought upon the voyage or ſervice, whereof the protection maketh mention, nor in treſpaſſes and other contracts made after the date of the ſame protection.

Prerogativa.

Prerogative.

The King may take his Creditor into his protection, that no other Creditor shall sue or arrest him, till the King be satisfied, which is also a protection *cum clausula volumus.* F. N. B. 28. *b.*

Statutes.

25 E. 3, cap. 19. A Creditor shall have action and judgment against the Kings debtor, notwithstanding such a protection. But not execution, unless he take upon him to pray the King, and then he shall have judgment and Execution of both debts, as well of that due to the King as to himself.

He may also by a writ called *Warrantia literæ*, **rehearsing that one which should appear in proper person,** Whether it be the Plaintiff or Defendant, **is in his service, will that for one day no default be recorded upon him.** So as if the tenant in a *præcipe quod reddat* make default at the grand *Cape*, or *petit cape*: yet before Judgment upon that default, the King by his writ may make that it shall not hurt him. And this standeth with reason, because every man is bound to serve the King in his affairs. Neither is it material whether he be in the Kings service or not, when the King certifieth that he is: for it seemeth by the words of the Writ, that the King by his prerogative may for one day warrant his default. And this writ cannot be granted but by the King himself. F. N. B. 17.

4 *Essoyne*

19 H. 6. 57. 4. *Eſſoyn De malo lecti*, is a writ to warrant an eſſoyn of lying ſick a bed caſt by the Tenant in a writ of right: Commanding four Knights to ſee him, and if he be ſick to give him day at the end of the year and the day for ſo long adjournment is in that eſſoyn.

Statutes.

Weſtm. 2. c. 17. In an Eſſoyn *De malo lecti* the Demandant may aver by inqueſt, that the Tenant is not ſick, nor in ſuch plight but that he may come before the Juſtices. Such an Eſſoyn ſhall not lye in a writ of right between two claiming by one deſcent.

F. N. B. 37. f. 5. A *Ne admittas* for either party, Plain. or Defendant, in a *quare impedit*, or aſſiſe of darreign preſentment to the ordinary, not to admit the others Clerk till the matter be diſcuſſed.

F. N. B. *Ibid.* And this muſt be ſued within 6. months and not after, for after the ſix moneths it is lawful for the Ordinary to preſent by lapſe but being ſued within the ſix moneths the Ordinary may neither himſelf (*b*) collate within ſix moneths (but afterwards by lapſe he may) nor (*c*) admit the others Clerk at any time, (*d*) though it be after the ſix moneths, and though it be found for him by a *Jure patronatus*, which is a commiſſion that the ordinary may grant to inquire who is the right patron.

(*b*) F.N.B. 48. *l.*
(*c*) *Fit. ibid.*
(*d*) F.N.B. 48. *b*

6. A

6. A *quare incumbravit* for him that ſueth a Ne admittas, and after recovereth in a *Quare Impedit*, or aſſiſe of darrein preſentment, though it be after the ſix moneths, but before recovery no *quare incumbravit* lyeth againſt the Ordinary for incombring the Church, contrary to the *ne admittas*. But of a collation or admittance before a *ne admittas* ſued, no *quare incumbravit* (but only a *quare impedit*) lieth, for the Ordinary can have no notice till the *ne admittas*. F. N. B. 48. *b.*

But no *ne admittas*, nor *quare incumbravit* lieth in a writ of right of avowſon, though the Church become void hanging the writ, and the Biſhop do incumber it, for the Demandant there ſhall not recover the preſentment but the avouſon. And if he have title to preſent, he may preſent, and upon diſturbance have a *quare impedit*. F. N. B. 48. *q.*

F. N. B. 48. *e.*

CHAP. 45.

Of Judgments.

THus far of Suit. Judgment is the Courts final determination of that ſuit. 10. *El.Dy.*26.8 *The writ of falſe judgment ſhall be Recordare fac. loquelam quæ fuit in eadem curia, & not quæ eſt, for by the judgment loquela is determined.*

Upon Judgment againſt the King in a petition, he is preſently out of poſſeſſion. And therefore every Judgment is in it ſelf a *movetas manu*, or an *ouſter unmaine*. In a writ of right the Judgment after iſſue joyned is final on either ſide, not 10. *E.* 3. *Stam. prær.* 78.

not only when it passeth by verdict, or
(c) F. N. B. 6. vanquishing of the others Champion, but
3 El. Dy. 301. where the Demandant is *(c) non suit*, or the
(d) F. N. B. 6. *(d)* Tenant maketh default, or the *(e)* vou-
(e) 26. H. 8. 8. chee after such an issue joyned by him, de-
F. N. B. 31. *d*, parteth in despite of the Court, &c.

Prerogative.

Against the King Judgment is not final, but is always with a *Salvo jure Regis.*

5 E. 3. 50. **Recoveries in a writ of right bind all strangers not claiming within the year.** As being suffered by a disseisor, it bindeth the disseisee by his non claim. **Tenant for life suffering a wrongful recovery, it shall prejudice his right that hath the inheritance, though he be prayed in aid and make default.** for no aid prayer is necessary, in as much as the other being tenant of the freehold, a recovery is good against him. **But that after the death of Tenant for life, he may falsifie it by action of** *Ad*
34 H. 6. 2.
4 H. 7. 3.
24 H. 8.
Br. Jau. rec. 41. *terminum qui præteriit*, or writ of right which we call falsifying of recoveries. But he cannot
(a) 26 H. 8. 2. enter, *(a)* neither can lessee for years or the Common Law falsifie for having but a Chattel derived out of a free-hold, there is no reason he should falsifie a recovery which draweth the fee-simple out of the Lessor. Also the present estate upon which the Lease depends being destroyed, the Lease must needs be extinct.

Statutes.

Statutes.

14 **Eliz. cap. 8.** Every fraudulent recovery against any Tenant for life, or whereupon any tenant for life, or he that hath right to estate for life is vouched, shall be void against him in the reversion, or in the remainder, unless it be by his own assent appearing by record.

21 **H. 8. cap. 15.** Termors for years or in by execution of Statute Staple, Statute Merchant, or *Elegit*, may falsifie recoveries only for their own Term in such sort as Tenants of the freehold, neither party nor privie to the recovery might at the Common Law.

In a writ of Dower by gardein in soccage against gardein by Knight service, *Lit.* 3.
he shall at his prayer be adjudged to endow her self wholly of the Land in soccage. And this is called *Dower de la plus beale.* But such dower shall not be where the woman is gardein *en fait* by Knight ser- *Park.* 88.
vice, nor where all the husbands Lands were holden in soccage, and she brings her writ of dower against the heir: nor where she brings it against her husbands feoffee with warranty, for he may vouch the heir.

A debt acknowledged in Court of Record either to the K. or to a Common, is in the nature of a Judgment, and called a Recog-

Recognisance. And therefore such a matter acknowledged by an Infant, cannot be avoided but during his nonage only. As a (a) fine by writ of errot, (b) Recognisance, Statute, or such like, by an *Audita querela*: for it shall be tried by Inspection of the Court, whether he were within age, or no.

(a) 18 E. 4. 13.
(b) 7 El. Dy. 232
18 E. 3. 5.

In appeals of (c) **maym, indictments or appeals of** (d) **felony, the accessory** shall not be **compelled** to answer **ill attainder** (e) **of all the Principals**, by verd. outlawr. or though it be by taking him to his Clergy, or abjuration. So as if the Principal die (f) or have his (g) pardon before, or if two men be indicted, one as principal, the other as accessary, and the principal be afterwards attainted of another felony and hanged: the accessary shall be discharged. And (i) if one of the principals be not attainted, the Accessary shall not recover damages against the Abettors, for he is not *legitimo modo acquietatus*. But in case of high Treason all offenders are accounted principals, and there is no accessary at all.

(c) 41 E. 3. trespass. 199.
(d) 40 E. 3. 42.
(e) 1 Mar. pl. 99
3 H. 7. 12.
4 E. 6. Br. co. 185
(f) 21 H. 7. 31.
(g) 3 H. 7. 12.
(b) 12 E 3. 12.

(i) 3 Mar. Dy. 12 c.

He that is or by possibility may be within orders, for one being within orders (if he shew them, or the ordinary certifie so much) shall have his Clergy, whether he can read or no. Otherwise he must be able to read a verse, namely, a **Deacon at the least, have the benefit of his Clergy**, save him either from Judgment when the Clergy is prayed before, or from execution

Stam. 133.

if

is be prayed after, if he be found culpable
verdict, or his own (k) confession either (k) Stam. 138. a
fore the Coroner, or the Justices of any
felony, where life or member is to be
, be it upon an indictment or appeal,
(l) not for killing a man by misfortune,
se defendendo, or yet for petty Larceny (l) Stam. 124.
r in these cases he is not to have Judg-
ent of life or member. No more in case of
gh Treason, or petty Treason. And such a
) Clerk might indeed by the antient (m) Stam. 136. c
w have had his Clergy before he were
icted. But now he shall not have it upon
arraignment, unless he plead to the felo-
and be found guilty: for otherwise he
uld lose his goods by an inquest of office,
which he would have no challenge as
may have to this. But yet he may
ve this benefit and pray his book after
inquest, and before their coming back.
which case notwithstanding, the ver-
t afterwards shall be taken. And that
is *favorem vitæ*: because if the Jury find
not guilty, he shall be charged. And
is possibility (there being no other im-
diment) as if it be a woman, a blind, or a
imed man, shall be tried by the Judges.
d therefore if the Ordinary challenge
m, where he readeth not as a Clerk, he
shall be fined and the party hanged. Or if Stam. 133. d.
refuse him when he doth read as a Clerk, 9 E. 4. 28.
e Ordinary shall be fined, and the par-
discharged, for the Court are Judges
his reading. And the Ordinary is there
only

only to challenge him for his Clergy, for the
9 E. 4. 28. entry is *Legit ut Clericus ideo tractatur ordinario*, by his ableness to read a verse, though he cannot read without spelling. But if he can read but here a word and there a word, and not three words together, *quære* whether that be sufficient.

Clergy in the delivering of him to the Ordinary to be kept in prison.

Stam. 138. *c.* If it be before Judgment, in which
Stam. 138. case we call him a Clerk convict, he shall be tried there by a Jury of Clerks. And therefore purging himself shall go at large. Therefore is a writ to command the Ordinary to admit him to his purgation. Not purging himself, but being found culpable by those Clerks, he shall be only degraded.

Stam. 139. *b.* But upon an appeal of Robbery, or such like, no purgation shall be admitted. The Reason seemeth because then the Plaintiff in the appeal should recover his goods without cause, when by the purgation it did appear that the other was not guilty of the felony.

Stam. 108. A Clerk convict shall not answer to any offence committed before.

Prerogative.

5 E. 6. Br. *forf.* 113 A Clerk convict forfeiteth his Chattels: And shall never have restitution,
Stam. 138. though he make purgation. Notice must be given to the King of the time before the party

arty make purgation. If the Clergy after Judgment, in which case we call m a Clerk attaint, he shall remain in perpetual prison. Stan. 138. c.

Statutis.

25 H. 8. cap. 3. Revived. 5 E. 6. c. 10. one arraigned upon an Indictment of petty Treason, willful burning of houses, Murder, Robbery, or other Felony, according to the meaning of the same Statute, if he stand mute of malice, or froward of mind, or challenge peremptorily above 20, or will not directly answer, shall lose his Clergy, in such manner as he should, if upon the arraignment he had been found guilty.

25 E. 3. *pro clero*, cap. 4. Convict of petty Treason shall have it.

18 Eliz. c. 6. None in Felonious Rape, Ravishment, nor Burglary.

18 Eliz. cap. 6. None in carnal abusing a woman within ten years of age.

25 H. 8. cap. 6. 5 Eliz. cap. 17. None in Buggery.

5 E. 6. cap. 9 None for him that robbeth any person in any part of his dwelling Booth, or Tent, in any Fair, or Market, himself, his wife, children, or servants then being there, or within the precinct thereof, either sleeping or awake.

4 & 5 Ph. and Mar. c. 4. None for him that maliciously commandeth or hireth any to commit petty Treason, or wilfull Murder, or Robbery in any dwelling house, or Inne, or near any high way, or within the marches of *England* against *Scotland*, or wilfully to burn any dwelling house, or any part thereof, or any Barn having Corn therein.

25 H. 8. cap. 3. and 5 E. 6. c. 10. He that doth a Robbery or Purglary in one County, and is taken with the goods so robbed or stoln, in another county, shall lose his Clergy there, as he should do where the Robbery or Burglary was committed.

4 H. 7. cap. 13. 1 E. 6. cap. 12. Grantable but once to one person, except he be within orders.

4 H. 7. cap. 13. He that asketh his Clergy the second time shall at a day certain bring his letters of order, or certificate.

4 H. 7. cap. 13. He that asketh his Clergy shall be marked in the hand with an M. if he were convict of Murder, with a T. if he were convict of other Felony.

1 E. 6. cap. 12. Lords of the Parliam. in all cases where Clergy lyeth at the Common Law, or is restrained by Statute, shall upon his prayer be adjudged as a Clerk convict h ough he cannot read.

8 Eliz.

8 El. cap. 4. and 18 El. cap. 7. After purgation he ſhall be put to anſwer to any ſuch offence (committed before his admiſſion to the Clergy) whereupon Clergy is not allowable, and whereof he was not before indicted and acquitted, convicted, or attainted, or pardoned, and ſhall be demeaned in all things, as if he had never been admitted to his Clergy.

18 El. cap. 7. He that is allowed Clergy ſhall not be delivered to the Ordinary, but after burning in the hand ſhall be delivered forthwith by the Juſtices out of priſon: yet for further correction, they may detain him in priſon, ſo that it be not above a year.

Outlawry is a Judgment, which in caſe of criminal offences we call an Attainder in it ſelf. So as he which is indicted of treſpaſs and outlawed ſhall pay a fine, he which is outlawed for felony, forfeiteth his lands and goods; and this fine and forfeiture remaineth though he purchaſe a Charter of pardon afterwards. And there is a Writ of Eſchete of Land for Felony *pro qua utlegatus fuit.*

So is abjuration an Attainder in it ſelf (and (a) that the ſtrongeſt that can be, being by his own confeſſion) and a (b) forfeiture of his Lands. And there is a writ of Eſchete of Land for Felony, *pro qua abjuravit regnum.* And therefore (c) he that is hanged upon Judgment againſt him, and becometh alive again, cannot abjure (but

(a) *Stam.* 122. *c.*
(b) 4 *El. pl.* 262
(c) 3 *E.* 3. *Cor.* 335.

an abjuration in that caſe is in eſcape) for one cannot have two Judgments for one offence.

2 H. 4. 24. 8 R. 2. avowry. 194 Stam. 167. e. Stam. ibid.

The offender upon a preſentm. in the Leet or Sheriffs turn ſhall be amerced.

The Def. in an appeal of Felony, being acquitted ſhall have judgment alſo to recover damages againſt the Plaint. And if the Plaintiff be not ſufficient, then Common Law and Common Reaſon will, that he recover his damages againſt thoſe that procured or abetted the Plaintiff to purſue the appeal. But theſe damages againſt the procurors or abettors were to be recovered at the Common Law only, by writ original that is to ſay, by writ of conſpiracy, and not otherwiſe.

Statutes.

Weſtm. 2 cap. 12. One being acquitted upon an appeal, or indictment of Felony, may have the abettors inquired and have a Judicial writ for his damages againſt, if the appellant be not ſufficient.

8 H. 6. cap. 10. An action upon the caſe given for him, that is duly acquit by verdict againſt every procurer of any Judgment or appeal of Treaſon, Felony, or Treſpaſs. And like proceſs ſhall be therein, as in a writ of Treſpaſs, *vi & armis*.

The Plaintiff recovering ſhall be allowed his coſts of ſute.

CHAP.

CHAP. 46.

Of Judicial Writs to execute Judgments.

THese Judgments have their Judicial Writs belonging to them, both meer Judicial Writs, for the execution of them, and new originals in the nature of Judicial Writs, to undo some matters concerning Judgments.

Meer Judicial Writs in real or personal actions, are either such as lie only within the year and day after the Judgment rendred or a *scire facias*.

Those of the first sort are between the parties to the recovery, for otherwise though it be within the year, he that recovereth is driven to his *scire facias*, as if it be for debt or damages recovered against a feme sole, who afterwards taketh a husband, or by or against ones Predecessor or Testator, **and in the same Court where the recovery was**, for if the Record of a Recovery in an assise of novel disseisin be removed within the year into the Chancery by a *Certiorari*, and from thence to the Common place by a *Mittimus*, or removed by Writ of Error out of the Common place into the Kings Bench, and the Judgm. affirmed within the year, yet the party is driven to a *scire facias*. So if a fine executory be remo-

14 *H.* 7. 15. 19.
15 *H.* 7. 5.
38 *E.* 3. *Sc. fac.* 77.
14 *H.* 7. *&* 15 *H.* 7. *ibid.*

ved out of the Common place into the Treasury, and come back by *Certiorari* and *Mittimus*, within the year no execution shall be by an *habere facias seisinam*, but by *Scire facias* only. But although the Judges of the Common place should all dye within a year after the Judgment, and other Justice be chosen, yet in that case execution might be well enough without a *Scire facias*; for it remaineth still the same Court, or if the Justices in Eyre come into the County, where one hath recovered before the Justices of Assise, they may award execution by a *Scire facias* within the year.

Of this kind are upon recovery in real or mixt actions.

F.N.B.. 167. *Habere facias seisinam* **to put him in possession upon a free-hold recovered**, in an assise. *præcipe quod reddat*, &c.

Habere facias possessionem, **upon a Term for years recovered**, as in an *Ejectione firmæ*, &c.

F.N.B. 38. *b.* & *f.* **A writ to the Bishop to admit ones Clerk upon a presentment recovered**, in a *Quare Impedit*, or assise of darrein presentment: If the sute be against the Bishop himself, then this writ may be to the same Bishop, or to the Metropolitan at the parties choice.

27 *El. Cor.* 11. *Sr. Wil. Herberts c.* **Those upon a recovery in personal actions, are of two sorts, either to have execution of the profits of his Land, and Chattels, or a** *Capias ad satisfaciendum*.

But in Court Barons Execution is only

only by diſtreſs, and impounding till the party be ſatisfied: for they have no power to ſell or deliver the diſtreſs to the party, neither doth any execution by the body lye there. 4 *H.* 17. 22 *Aſſ. Pl.* 71.

In thoſe of the firſt ſort execution ſhall be of any (a) land which the party had day of the Judgment rendred, but for (b) chattels (though it be (c) leaſes for years) only thoſe which he had day of the execution ſued. (*d*) So as if he ſell his goods *bona fide*, after Judgment, and before the writ of Execution ſued forth, thoſe goods are not liable to the execution, or if a writ of execution be ſued forth and never returned, and after the Defendant alien his goods, and then the Plaintiff purchaſeth another writ which is returned, yet execution ſhall not be of thoſe goods, for writs which never are returned are not of record, nor of any force at all. But an alienation made after the *Teſte* of that ſecond Writ had been nothing worth.

(*a*) *Old N. B.* 165. (*b*) *Old N. B. ib.* 2 *H.* 4. *ibid.* (*c*) 42 *E.* 3. 11. 2 *H.* 4. 14. (*d*) 24 *El. ibid*

Of this kind are a *Scire facias*, and a *Levari facias*. *Fieri facias* to levy execution of his goods and chattels only. *Levari facias* to levy execution of the profit of his land and Chattels. The form is, *Prædicta pecuniam de terris & catallis prædicti* (the Defendant) *levare facias, ita quod ea habeas in tui' tali die præfat.* (the Plaintiff) *deliberand.* And this having words that he ſhall levy the money of his Lands and chattels, it ſeemeth that the Sheriff may take the Rents

Fieri facias

15 *El. Pl.* 441. *Old N. B.* 165.

payable by the Tenants in execution of the debt, but not to seise the Land, and deliver it to the party.

Statutes.

Westm. 2. cap. 18. He that recovereth debt or damages in the Kings Court, may at his choice have a *Scire facias* of the Land and Chattels of the Debtor, or a writ for the Sheriff to deliver him all the Chattels of the Debtor (except Oxen and plow-beasts) and the moyety of his Land by a reasonable extent, till the debt be levied. And if he be ejected out of the Land, he shall have an assise; and afterwards a writ of re-disseisin if need be.

fieri facias

11 E. 1. Stat. Action Burnel. A debt acknowledged to a Merchant, before the Mayor of *London*, *York* or *Bristol*, or before a Mayor or Clerk (appointed by the King thereunto) shall be enrolled. And if it be not payed at the day, the debtors moveables shall be prised, and sold in satisfaction by the Mayor, if he have any within his jurisdiction, else by writ out of the Chancery upon a Certificate of the Recognisance thither. The Prisors to take them of the price if they prise too high, if they have not moveables sufficient, then he shall be imprisoned till, &c. The like process against pledges, in default of sufficient moveables of the principal.

13 E.

13 E. 1. Stat. *De mercatoribus.* A debt acknowledged to a Merchant before the Mayor of *London*, or chief Wardein of a Town, which the King ſhall appoint, or other ſufficient men when they cannot attend, and before a Clerk which the King ſhall aſſign, ſhall be inrolled, and if it be not payed at the day, the Debtor, if he be a Lay-man ſhall be impriſoned by the Mayor till, &c. if he be within their power, elſe by Writ out of the Chancery upon Certificate of a Recogniſance thither. And if he agree with the Creditor within a quarter of a year after, then all the Lands which were the Debtors, day of the Recogniſance made, and alſo his goods, ſhall be delivered to the Creditors on a reaſonable extent. And of theſe lands ſo delivered, the coniſee being ouſted, ſhall have an aſſiſe or re-diſſeiſin.

The writs out of the Chancery ſhall be returnable before the Juſtices of either Bench, and upon a *Non eſt inventus* returned, or that he is a Clerk, writs to all the Sheriffs where he hath Lands or goods, ſhall go forth to deliver the ſame upon reaſonable extent, and to what Sheriff he will to take his body.

The like proceſs ſhall be againſt the pledges, if the money be not payed at the day.

If the debtor or pledges die, the Creditor ſhall have execution upon the Lands of the the heir at his full age.

27 E. 3. c. 9. The Mayor of the Staple ſhall take Recogniſance of debt before himſelf

ſelf and the Conſtable of the Staple, whereupon default of payment being made, the debtors body ſhall be impriſoned, and his goods ſold in ſatisfaction (if they be within the Staple) elſe upon a Certificate in the Chancery, a Writ ſhall go out from thence to impriſon their bodies, and ſeiſe their lands and goods which ſhall be returned in the Chancery, and Execution thereupon in all reſpects, as in the Statute Merchant: Save that the Debtor ſhall have no advantage of the quarter of a year.

5 H. 4. cap. 12. A Statute being once ſhewed in the Common place, and the proceſs afterwards diſcontinued, yet execution may afterwards be awarded without ſhewing it again.

11 H. 6. cap. 10. He that is in priſon upon a Recogniſannce, ſhall not be delivered out of priſon upon a *Scire facias* againſt the party and ſurety thereupon found to the King alone, but ſhall find ſureties ſeverally as well to the King as to the other party.

23 H. 8. cap. 6. Either of the chief Juſtices, or in their abſence out of the Term, the Major of the Staple of *Weſtm.* with the Recorder of *London* may take Recogniſances. And they ſhall be executed in all reſpects as a Statute Staple.

27 Eliz. cap. 4. Every Statute Staple, or Mer-

rchant, not brought to the Clerk of Re-
gniſances within four moneths next after
acknowledging, to enter a true copy
reof, ſhall be againſt all perſons, their
rs, ſucceſſors, executors, adminiſtrators,
aſſigns only, which for good conſide-
ion ſhall after the acknowledging of the
e Statute purchaſe the Land, or any part
ble thereunto, or any Rent, Leaſe, or pro-
of it.

32 H. 8. cap. 5. Lands lawfully delive-
in execution upon a judgment of Re-
gniſance, being evict. without any fraud or
ault in the Tenant before he have levi-
the whole debt and damages, the Reco-
er and the Recogniſee ſhall have a *Scire*
ias out of the ſame Court where executi-
was awarded, returnable there full for-
days after the date. And thereupon a new
it of Execution of the nature of the for-
r to levy the reſt of his debt and dama-
s, if the Defendant make default, or ſhew
good matter in Bar.

Magn. chart. cap. 8. The King ſhall not
e the lands or rents of the debtors, if he
e ſufficient chattels.

Magn. chart. cap. 18. The goods of
e Debtor may be attached after his death
the view of lawful men. That nothing
all be medled with till the Kings debt be
yed.

33 H.

33 H. 8. cap. 39. All obligations to the King shall be of the force of a Stat. Staple.

Prerogative.

The King may habe a *distringas* to le[vy] by an amercement, or such like, by distre[ss] and sale, whether it be an Amercement in the Leet or Sheriffs turn, or o herwise.

Old N. B. 167. A *Capias, ad satisfaciendum* is to take
17 *El. Coo.* 12 his body in execution, for satisfying of the
Sr. wil. Herb. c. party. And this is always upon a recovery
2 H. 4. 6. in a personal action where a *Capias* lay. Therefore it lyeth not in any real action as in a Writ of dower, or other *precipe quod reddat*, nor at the Common Law in exe debt, detinue, account, &c. but in action
40 E. 3. 25. of Trespas, and such like. And here an
49 E. 3. 2. *igent* shall be awarded upon the first *Capias*
49 E. 3. *ibid.* *as*, for if he were taken by the *Capias*, he should pay unto the King a fine for a Tres pas adjudged against him.

Prerogative.

Of this nature are two special Writs by the Kings Prerogative, *Capias pro fine Regis*, and *capias utlagatum*.

1 H. 7. 20. *Capias pro fine Regis*, when the party is adjudged to pay a fine unto the King.

Old N. B. 168. *Capias utlagatum*, to take one outlawed which is a kind of Judgment and determination of the Original Writ as appeared before.

These

These are the Judicial Writs within a year and day.

A *Scire facias*, which lieth after the year and the day, **is to warn the Defendant upon recovery in real actions**, for in personal actions debt only lay after the year, which is a new original till *Westm.* 2. *cap.* 45. Here a *Scire facias*, **to shew cause why the Plaint. should not have execution.** Therefore here the Defendant may plead matters shewing after judgment rendred to ouſt the Creditor of his execution, as outlawry &c. or a Release of all actions, for in as much as he may plead upon this *Scire facias*, it may well be called an action, though it be but a writ of execution. But notwithſtanding that a Writ which recovereth debt or damages, relateth to the Defendant all actions, yet he may lawfully ſue execution by a *Fieri facias* or *Levias ad ſatisfaciendum*, *&c.* for theſe cannot be called actions **here upon a *Nihil* returned, execution ſhall be preſently awarded againſt the parties to the Judgment.** But (*b*) againſt Executors, or Adminiſtrator or in a *Scire facias* upon a (*c*) Recognizance or (*d*) Charter of pardon, upon an Outlawry, or ſuch like, or to (*e*) repeal a Patent, for in all theſe caſes two *Nihils* muſt be firſt returned. And therefore a *Scire facias alias* ſhall go forth. And the (*f*) Ambiguities of ſummons, attachment, eſſoyn, view of land, &c. lye not in this writ.

Old N. B. 163. 27 *El. Coo.* 12. *in St. Wil. Her.* *c.*

Lit. 116.

8 *E.* 4. 15. 1 *El. Dy.* 167. 19 *H.* 8. 6. 22 *H.* 6 41. 2 *H.* 7. 3.

24 *H* 8. *Br. peremptory* 63. 1 *Eliz. ibid.*

(*b*) 1 *Eliz. ib.* (*c*) 1 *El. ibid.* (*d*) 1 *El. ibid.* 2 *El. Dy.* 172. 8 *E.* 4. *ibid.* (*e*) 26 *H.* 8. *p. Dy.* 198.

(*f*) *The Stat. Weſt.* 2. *cap.* 46. *doth ſo recite it.*

Statutes

Statutes.

Westm. 2. cap. 46. For all things recorded before the Kings Justices, or contained in fines (whether contracts, covenants, obligations, services, or customs acknowledged, or any other things enrolled) a writ of Execution shall be within the year, so as the parties shall not need to plead: After the year a *Scire facias*. The like is of mesne who by Recognisance or Judgment is bound to acquit.

In case of life the Judg may command execution to be done without any writ.

(a) 22 *ass. pl.* 71 (b) 22 *ass. pl. ib* (c) 23 *ass. pl.* 2. (d) 22 *ass. ibid.*

A woman (a) **quick with child** (b) the trial whereof is by a Jury of women: and the writ for it is called a writ *De ventre inspiciendo*, shall for (c) once, and no more, be respited (d) execution, but it is no plea upon her arraignment, to say, that she is enseint, but she must answer to the Felony.

CHAP. 47.

Of new Originals in the nature of Judicial Writs, to undo matters concerning Judgments.

The new Originals in the nature of Judicial Writs to undoe some matters concerning Judgments, whether

ber it be the judgment it ſelf, or the verſict whereupon Judgment is given, that ſo the judgment alſo may be undone, or to avoid the execution growing upon the judgment, are either writs grounded upon error, or an attaint, and *Audita querela*.

Writs grounded upon Error, are a writ of Error and falſe judgment, both which lye upon any error in the proceedings, as well in *Redditione executionis* (as upon a *Capias ad ſatisfaciendum*,) awarded for damages recovered in a real action, as in *Additione Judicii*. 16 H. 7. 6.

But Error in Proceſs, may the ſame Term be reformed in the ſame Court, whether it be in the Kings Bench (*a*) or Comm on place (*b*) and that by writ or without.

The proceſs here is a *Scire facias*.

The party bringing a writ to reverſe error in the Judgment may have a *Superſedeas* to ſtay execution till the error be diſcuſſed, whether it be matter apparent or matter *en fait*, that is alledged for Error. But no ſuch *Superſedeas* ſhall be upon an Attaint; for that which is found by the oath of 12 men is intended true till it be reverſed, but it may as well be intended that there is an error in the Record, as not.

(*a*) 7 H. 6. 28.
(*b*) F. N. B. *b*. 12 E. 4. 11. 5 H. 7. 25.

A writ of Error is upon an Error in Court of Record.

And may be ſued in the Kings Bench, or Parliament.

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(a) 22 *ass. Pl.* 71
(b) 22 *ass. pl. ib*
(c) 23 *ass. pl.* 2.
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And may be ſued in the Kings Bench, or Parliament.

In

(a) F. N. B. ib. (b) 13 El. pl. 393 (c) 14 H. 7. 1. 8 El. Dy. 250. 21 El. So holden in the Common place, contrary to Fitz. N. B. 21. t.

In the Kings Bench when the error is in any inferior Court, Whether the judgment be given in the Common place (a) Chancery (b) City (c) or Corporate Town, as before the Mayor of *Excester*, or other Court of Record, for no Writ of Error is returnable in the Common place.

Statutes.

9 Ric. 2. cap. 3. If Tenant for life, or in tail, after possibility of the issue extinct be impleaded, and judgment pass against him, he that is in the Reversion at the time of the judgment, shall have a Writ of Error upon an Error in the Record of the same judgment, as well in the life of such a Tenant as after his death. And if at any time of reversing of the judgment, the Tenant for life, &c. be alive, he shall not be restored, &c. his possession, with the mesne issues, and he in the reversion to the arrearages of the same Rent, if any be due. But if the Tenant for life, &c. be dead at the time of the reversing of the judgment, then he in the reversion shall be restored to possession, with the issues after the death of their Tenant for life, &c. and the arrearages of Rent due in his life.

31 Ed. 3. cap. 12. Error in the Exchequer shall be reversed before the Chancellor and Treasurer, taking to them the Justices

ſtices, and other ſuch ſage perſons, as they think fit. And after the Roll ſhall be ſent back into the Exchequer, to make execution.

31 Eliz. cap. 1. * If either Lord Chancellor or Lord Treaſurer, or both the chief Juſtices come at the day of adjournment in a Writ of Error in the Exchequer, it ſhall be no diſcontinuance.

32 H. 8. c. 30. made perpetual. 2 E. 6. cap. 22. After a verdict tryed by twelve men, or more, in any ſute in Court of Record, no judgment ſhall be ſtayed or reverſed for any miſpleading, lack of colour, inſufficient pleading, miſcontinuance, diſcontinuance, miſcontaining of Proceſs, miſ-joyning of the iſſue, lack of warrant of Atturney: for the party againſt whom the iſſue is tried, or any other default or negligence of the parties, their Councellors, or Atturnies.

18 Eliz. cap. 4. After a verdict of twelve men, or more, in any ſute in Court of Record, judgment ſhall not be ſtayed or reverſed for default in form, or lack of form, as falſe Latine, variance from the Regiſter, &c. in any writ original or judicial, declaration, bill, or plaint, or for want of any writ original or judicial, or by reaſon of any imperfect or inſufficient return, or for want of any Atturney, or for any manner of

default in proceſs upon, or after the prayer or voucher.

27 Eliz. cap. 5. After demurrer joyned or entred in any ſute in Court of Record, the Judges ſhall proceed and give judgment according as the very right of the cauſe and matter in Law ſhall appear unto them, without regarding any imperfection, defect, or want of form in any writ, return, plaint, or declaration, or other pleading whatſoever; except thoſe only which the party ſpecially and particularly ſhall ſet down and expreſs, together with his demurrer. And that no judgment to be given, ſhall be reverſed by any writ of Error, or by any ſuch imperfection, defect, or want of form, as is aforeſaid, except as only be before excepted.

Theſe two laſt Statutes extend not to Sutes of Felony, or Murder, nor to Indictment or Preſentment of them, or of Treaſon, or other matter, nor to proceſs upon any of them, nor to any ſute upon a popular, or penal Statute.

1 H. 7. 19.
23 El. Dy. 375.

In the Parliament, when the error is in the Kings Bench: And is returnable before the King and the Lords only. The order whereof is this, *viz.* The party that ſueth it, muſt have a Bill from the King indorſed; and thereupon the Chancellor muſt make him a writ of Error, and then the chief Juſtice of the Kings Bench ſhall bring with him (in the Parliament) unto the Lords in the Inner Parliament Chamber, the

the writ or Error, and the Bill indorſed, and all the Rolls wherein are contained the Pleas and Proceſs, in which Error is ſuppoſed, and there ſhall leave the tranſcript of all the Record and Proceſs, &c. together with the ſaid Writ of Error with the Clerk of the Parliament, who ſhall have the cuſtody thereof. And by the Lords only, and not the Commonalty ſhall a Steward be aſſigned, who together with the Lords, by advice of the Juſtices, ſhall proceed to amend the error.

Statutes.

27 Eliz. cap. 8. An Error in the Kings Bench in an action of debt, detinue, covenant, account, action upon the caſe, *Ejectione firme*, or treſpaſs firſt commenced there (where the King is no party) may at the parties choice be reverſed in the Exchequer Chamber before the Juſtices of the Common place, and ſuch Barons of the Exchequer as are of the choice, or ſix of them at the leaſt, other than for error concerning the juriſdiction of the Kings Bench, or want of form in a Writ, Return, Plaint, Bill, Declaration, Pleading, Proceſs, Verdict, or proceeding whatſoever. And upon the Judgment affirmed or reverſed, the Record ſhall be ſent back into the Kings Bench, to proceed and award execution thereupon.

The party grieved with ſuch reverſal or affirmation, may have a Writ of Error in the

Parliament as upon Judgment in the Kings Bench.

31 El. c. 1. And any three of the Justices and Barons (if the full number come not) may receive Writs of Error, award Proceſs, prefix days for the continuance of the Writs of Error.

F. N. B. 17 & 18. **False judgment is upon error in a base Court.**

Thus much of writs of error and false judgment, there followeth an attaint, and *Audita querela.*

13 *E.* 4. 9. **Attaint is to inquire whether a Jury of 12 men gave a false verdict.** That ſo the judgment following upon it may be reverſed, and the party reſtored to all that he hath loſt, that is to ſay, if it be the Defendant to his damages, and whatſoever elſe: 9 *aſſ. Pl.* 21. if the Plaintiff to his title, his action, &c. for an attaint lyeth not till judgment be given, *Br. attaint.* 42. and if the Writ bear date before, it ſhall abate. And this lyeth only upon a verdict by twelve, for if he loſe in a Writ of right, no attaint lyeth neither by the Common Law, nor Statute, becauſe it paſſeth by a Jury of more than twelve, that is to ſay, the grand aſſiſe. No more doth it in an inqueſt of 39 *H.* 6. 1. office, and upon a writ to enquire of da- 3 *H.* 6. 29. mages in treſpaſs, for that may be by a leſs number than twelve.

And this muſt be brought in the life of him for whom it paſſed, and of ſome of them that gave it, whom we call the petty Jury

Jury, for if either the (*a*) party himſelf, or (*b*) all the petty Jury be dead, or (*c*) all of them but one, the attaint faileth, **and lieth only upon a verdict in perſonal actions other than treſpaſſes**: For it ſeemeth that there was an attaint at the Common Law, becauſe **Weſtm. 1. c. 37.** ſpeaketh of attaints without expreſſing any penalty. And **24 E. 3. cap. 7.** giveth it in plea real as well as perſonal. So as it lay before in a plea perſonal, debt, detinue, covenant, and ſuch like: but not in treſpaſs, for that is given by Statute. And the reaſon why it lay not in an action of Treſpaſs, is becauſe then upon reverſing of the recovery the King ſhall loſe his fine. Neither did it lye at the Common Law in a plea real of **Land**, for **Weſtm. 1. cap. 37.** giveth it in that caſe. And the reaſon of that was, becauſe he that loſeth may have a writ of right.

(*a*) 25 *H.* 8. *Dy.* 5 26 *aſſ. Pl.* 12.
(*b*) 13 *E.* 4. 5.
(*c*) 34 *aſſ Pl.* 6. 26 *aſſ. Pl.* 2.
Br. attaint. 42.

The Jury here called the grand Jury, **are 24, who are to be warned the 1. day.** *Old N. B.* 111.

And the proceſs is againſt the party ſummons, re-ſummons, as in a mortdanceſter, darrein preſentment, and *Juris utrum*, **againſt the petty Jury**, *Venire facias*, **and diſtreſs.** *Old N. B.* 112.

The petty Jury muſt be all preſent, when the grand Jury is taken, elſe it can never be taken, which was a great miſchief at the Common Law, for it might be that ſome of them had nothing, and ſo would never appear. **And may plead in bar of the attaint**, as a releaſe, arbitrement, &c. for this excuſeth

22 *H.* 6. 8.
35 *H.* 6. 30.

excuſeth them of their falſe oath, but not
19 *aſſ. Pl.* 15. in abatement of the writ, as another attaint hanging, that the Demandant had joyntly with another not named in the writ: or if a woman bring it to ſay ſhe is covert,&c

The Plaintiff in the attaint can give
34 *H.8. Dy.* 53. no more evidence than was given at the firſt. But the Defendant in affirmance of the firſt verdict may.

Statutes.

Weſtm. 1. cap. 37. An attaint is given in pleas of Land or of freehold,or of things that touch free-hold.

1 E. 3. cap. 8. In writs of treſpaſs as well upon the principal as the damages, though Execution be not ſued of them.

28 E. 3 cap. 8. And that as well by Bill as by writ, without regarding the quantity of the damages.

34 E. 3. cap. 7. An attaint is given in every plea, real as well as perſonal.

9 Ric. 2. cap. 3. Given to him in the reverſion, living his Tenant for Term of life upon a recovery againſt him, with reſtitution of the Tenant that loſt his poſſeſſion, with the meſne iſſues. And of him in the reverſion to the arrearages of his Rent. But if the Ten that loſt be either dead,or were of covin with him that recovered, then reſtitution ſhall be to him in the reverſion of the

the poſſeſſion it ſelf, with the meſne, iſſues and arrearages, after ſuch death and recovery by covin.

14 E. 2. Of Sherliffs and green wax, if the petty Jury appear not at the firſt grand diſtreſs againſt them, or a *Nihil* be returned, the grand Jury ſhall be taken by their default.

32 H. 8. c. 3. Made perpetual 13 El. cap. 9. In a ſute before Juſtices of Record not concerning life, an attaint is given againſt the petty Jury, and every of them, and the party himſelf.

The proceſs againſt the petty Jury and grand Jury, ſhall be ſummons and re-ſummons, and diſtreſs infinite.

Open proclamation ſhall be made in the Court where the diſtreſs is awarded more then fifteen days before the return of the diſtreſs.

The grand ſhall be taken in default of the Defendant, or petty-Jurors, or any of them.

The petty Jury that appear, being the ſame perſons, and the writ, proceſs, return, aſſignment of the falſe oath good, ſhall have no anſwer, but that he made a true oath, except the Plaintiff or Demandant hath been *non ſute*, or diſcontinued, or had judgment againſt the petty Jury upon his ſute of attaint. But the party himſelf ſhall plead any thing only in Bar of the at-

taint. Notwithſtanding which plea, the grand Jury ſhall without delay inquire of the truth of the verdict. Such a day ſhall be given in the Proceſs as in a writ of dower, and no eſſoyn or protection allowable.

By the death of the party, or one of the petty Jury, the attaint ſhall not abate, nor be deferred againſt the reſt, as long as two of the petty Jury ſhall live.

Every attaint ſhall not be in the Kings Bench, or common place, and the *Niſi prius* granted upon the diſtreſs by the diſcretion of the Juſtices. And every of the petty Jury may be by Atturney. The *non ſute* or releaſe of one when there be divers Plaintiffs, or Demandants in an attaint, ſhall not prejudice the reſt.

Every one of the grand Jury muſt have 20 marks a year Land of Free-hold, out of antient demeſne. But if the value of the thing in ſute be under the value of forty pounds, then five marks a year, or a hundred marks worth of goods ſufficeth for default of ſuch ſufficient Jurors, within the ſame Country, a *Tales* ſhall be awarded unto the next.

11 H. 6. cap. 4. The Plaintiff ſhall recover coſts and damages againſt the Juror or Defendant, that pleads a fained plea in delay. *Audita querela* is for one being or to be in execution to relieve him on good matter of diſcharge which he hath, no means to

to plead. As if one having a releaſe, be taken in execution in one Court, as in the Common place, by Writ out of another (as out of the Chancery) returnable in the Common place, upon a Recogniſance, or condemnation in the Chancery. (But if the Recogniſance or condemnation had been in the Common place, then they might have awarded proceſs upon that matter.) If execution be ſued of a Recogniſance by *Fieri facias* or *elegit*: (but not by *Scire facias*, for there he hath day to anſwer, therefore it is his folly if he come not in and plead it, that is to ſay, where the Sheriff returneth him warned: otherwiſe it is upon a *Nihil* returned) if a releaſe or acquittance be made unto him after the *Scire facias* ſued, if after verdict and before judgment they have put themſelves into arbitrement. 22 H. 8. 56. 48 E. 3. 20. 12 H. 4. 6. 15.

The Proceſs where the *Audita querela* is ſued, before execution is a *venire facias* and diſtreſs, and upon default after appearance and plea pleaded, a *diſtringas ad audiendum Judicium*, for thereby Judgment is to be given againſt him. And in this caſe of an *Audita querela* ſued before execution, he may have a *Superſedeas* upon good matter of diſcharge ſurmiſed in the writ of *Audita querela*, to ſtay for once the execution upon ſureties, ſo (*a*) can he not being in execution. Neither (*b*) can he have a *Superſedeas* before execution oftner then once, though (*c*) it be upon new matter. But if the (*d*) Au- *Br. Audit querel.* 15. 22 H. 6. 56. 12 H. 4. *ibid.* 47 E. 3. 1. 17 E. 3. 3. 28 E. 3. *p.* *Old N. Br.* 66. (*a*) 11 R. 2. *Superſed.* 14. (*b*) 2 H. 7. 12. 22 H. 6. 34. (*c*) 43. E. 3. 28. *F. N. B.* 104. *q.* *cont.*

(d) F.N.B.204. q.

(d) *Audita querela* be abated for variance from the Record, or ſuch like, there is another *Audita querela*, he may have a ſecond *Superſedeas*.

22 H. 6. 56. 15 E. 4. 5.

After execution the proceſs is a *Scire facias*, as if he be brought in by a *Capias*, *ad ſatisfaciendum*, for there he is in priſon, otherwiſe it is if he be not taken by a *Capias*, but come in *gratis*. And this *ſcire facias* is only for the more haſty expedition of the party that is in priſon, for if the proceſs ſhould be by diſtreſs infinite, peradventure the party would loſe iſſues to keep the others body in perpetual priſon.

CHAP. 48.

Of certain ſpecial Writs wherein no Proceſs lyeth.

THus far of an action, and the ſeveral parts of it. And of writs both Original and Judicial, that begin or proſecute the Action. Beſide which, there be certain other Originals out of the Chancery, which are as it were ſpecial anomalies and exceptions from the former. Being not diductory to bring any matter into plea or ſolemn action, but only Commendatory or Prohibitory to do or leave ſomething undone. And therefore no Proceſs at all lieth in theſe

these writs, but only an (a) Attachment upon a contempt, for not executing or obeying them. (a) F. N. B. 6. b. 158. d. 134. a. Old N. B. 15. 35.

Of which nature are,

1. Commendatory ones, these that follow. *Dote assignanda*, is for the wife of the Kings Tenant, when the King is intituled by office of Land, whereof she is dowable, always directed to the Escheator. And may be either to deliver her such part of her Land as is already assigned to her in the Chancery for her dower, or for the Escheator himself, to assign her part unto her. F. N. B. 263. c. F. N. B. 263. d.

If her husband held in chief, then she must first take an oath in the Chancery, not to marry without the Kings licence, before she can have this writ. But if he held of the King by Knights service, as of a manor, or if he held from one that is in ward to the King by reason of his non-age, there she shall not need to take any such oath. F. N. B. 263. c. F. N. B. 264. a.

Homagio capiendo, for tenant by homage auncestrel to compell the Lord to receive his homage, and is to save his warranty and acquittal, which he loseth if he be impleaded before the Lord have received his homage. 45 E. 3. 23.

Scutagio habendo for the Lord to have escuage of his Tenants by Knights service, when the same is due, by reason of any voyage Royal made by the King in proper person, or by his Lieutenants against the Scots, or them of Wales. F. N. B. 83. c.

And

F.N.B. 82. *k.c.* And to make his ſon a Knight, or to marry his daughter, for the Lord to have this aid of his Tenants, where it is due.

De Corrodio habendo, & de Annua penſione,

(*a*) *F.N.B.* 230. *a* for the King. The (a) firſt to have a corro-
(*b*) *F.N.B.* 231 *g* die for his ſervant, the (b) other to have a
(*c*) *F.N.B.* 230 *a* penſion granted to his Chaplein (c) till he
(*d*) *F.N.B.* 230 *a* & 231. *g.* be promoted to a benefice. Both (d) theſe where the ſame are due. As (e) of common
(*e*) *F.N.B.* 230 *a* right a Corodie is due from every Abbey, Priory, or other houſe of Religion, whereof the K. is founder in the right of his Crown.

(*f*) *Fit. ibid.* *F. N. B.* 229. *b.* A (*f*) penſion from every Biſhoprick in *England* or *Wales*.

De libertatibus allocandis, for one whether a ſingular perſon, Burgeſs, Citizen, or other, or a body corporate, impleaded before the Kings Juſtices of the one Bench or other, Juſtices errants, Juſtices of the forreſt, &c. to have the liberties granted them by the King or his progenitors, to be allowed where the Juſtices will not make allowance of them. And therefore is to be directed to the Juſtices themſelves, not to the Sheriff for he is but their officer, and ſubject to be amerced by them, if he do not his office as he ſhould.

Old N. B. 15. *De executione Judicij*, to have a Judgment executed, whether the ſame were given in a Court Baron, *viz.* the Court of the Lord, Hundred, or County Court, by writ of right *Juſticies*, or plaint without writ, or in Court of Record. The ſame to be directed

rected to the Sheriff, if judgment were given before the Bayliff in the Hundred or Lords Court, to the Coroners if it be before the Sheriff in the County Court; to the Juſtices themſelves, if it be in a Court of Record. And this writ is a *Juſticits*.

De reſtitutione temporalium, **where the temporalties** before ſeiſed into the Kings hands, **are to be reſtored** to a Pryor or Biſhop elect and conſecrate. And this muſt be directed to the Eſchetor. *FNB.* 169.

De ſecuritate pacis, **for him that is in fear of corporal hurt**, to be killed, beaten, aſſaulted, &c. **or of the burning of his houſes, to be ſecured of peace in that behalf, againſt the party whom he feared.** And may be for either of theſe cauſes alone, or for both joyntly in one writ, **where a corporal oath muſt be taken by him that ſtandeth ſo in fear.** And that was wont to be in the Chancery before ſome Maſter of the Chancery, by the antient courſe of Law. But now they uſe to purchaſe ſuch writs by their friends there without taking of an oath, which maketh them to be ſued forth many times more for the vexation of the parties than upon any juſt cauſe. The common form of this writ ſince the Statute 1 *E.* 3. **cap.** 16. which appointeth Juſtices of Peace, is for the eaſe of the people ſomewhat altered and it is called a *ſupplicavit*, directed ſometimes to the Juſtices of peace, and to the Sheriff, ſometimes to the Juſtices or one Juſtice ſole, and ſometimes to the Sheriff *F. N. B.* 79.

Sheriff only to compell the party to find ſufficient mainperors in a reaſonable ſumme of money, that he ſhall neither do nor procure any bodily hurt, or burning of the parties houſes; or upon refuſal, to commit him to the Gaol till he do.

Old N. B. 33. *De vi Laica removenda*, **to remove all lay force in any Church**, eſpecially where debate is between two perſons of a Church of prebends about the title, and one with force and arms holdeth the other out: and

(a) *F. N. B.* 54. (a) this writ may be as well upon the bare ſurmiſe of the Incumbent or party grieved, without any Certificate made by the Biſhop into the Chancery, of ſuch force as upon, and by reaſon of ſuch Certificate. And there be two ſeveral forms of Writ in theſe two caſes, but hereby the Sheriff may not remove the incumbent out of poſſeſſion of the Church, whether he be in by right or wrong, for then he may have a writ to reſtore him again, but only remove the force: and this writ is returnable or not returnable at the parties pleaſure that doth ſue the ſame, and may be returnable in the Common place, as well as in the Kings Bench.

F. N. B. 185. *d.* **Of cleanſing ſtreets to have the waies, ſtreets or lanes of a Town Corporate**, of the Suburbs of it, **to be made clean, and ſo kept, when they be ſtrecht**, by dung and filth, hogſties, and ſuch like, whereby the air is corrupted and infected, to the indangering of the health, or other great diſcommodity

modity to the Inhabitants or Travellers that way. But it seemeth that no such writ lyeth for the village in that Countrey, though they be not kept clean, but for Corporate Towns only.

De Leproso amovendo, to remove a Leper or Lazer, that will come abroad to Church among his neighbours from the company of men to some solitary place of dwelling, And that is for fear of infecting of them: but if he will keep in his house, and not come among his neighbours, then it seemeth he shall not be removed thence, nor that any Lepers or Lazers shall be removed by this writ, but only such as appear to be so by their speech, ulcers rottenness of flesh, stink, and such like, and not those, that though they be infected inwardly, yet appear not so without. F. N. B. 234.

De excommunicato capiendo, upon a *significavit*, so we call the Ordinarie Certificate into the Chancery, that one excommunicate standeth out forty days, and will not be justified by the censures of the Church to imprison, and so to justifie him, by his body, till he satisfie holy Church for his contumacy and contempt, and this Writ also is a *Justicies*. Old N. B. 34. & 35.

De excommunicato deliberando, to deliver him out of prison when the Church is satisfied, and hath absolved him. Old N. B 35. a. F. N. B. 63. a. f.

De cautione admittenda, when one taken by an *Excommunicata capiendo*, offereth sufficient pledge, or caution to obey holy F. N. B. 63.

Church

Church, which is refused to have that caution admitted and to be deliberd: and may be either to the (a) Ordinary himself to command him to be delivered, which the Ordinary may do by word, or to (b) the Sheriff to make such deliverance, and then it is withal, a *de excommunicato deliberando*.

(a) F. N. B. ib.

(b) F. N. B. 63. 6.

De heretico comburendo, to cause one convicted for an Heretick to be burnt. And this as the other writs to be directed to the Sheriff, the party being committed by the Clergy into the secular power. But by the Statute 2 H. 4. cap. 15. Every Bishop in his Dioces may convict a man of Heresie, and cause him to abjure, and after convict him anew, and condemn him to the fire, and thereupon make a precept to the Sheriff to take and cause him to be burnt, and the same a sufficient warrant to the Sheriff without any writ of the King: but that Statute is repealed by 25 H. 8. c. 14. so as now the Ordinary cannnot commit him to the lay people to be burnt without the Kings Writ first purchased.

F. N. B. 269.

De coronatore exonerando, to discharge a Coroner of his office upon just cause. As if he cannot attend his office for other businesses of the Kings that he is imployed about in the same County, or be old and feeble, or unfit for the office, and have not lands and tenements sufficient in the County, whereupon he may dwell according to his estate, or have the Palsey, or dwell in the remote

F. N. B. 163. n.

remote parts of the Shire, so as he cannot conveniently exercise the office, or such like.

And this writ is directed to the Coroner himself. F. N. B. ibid.

De exonerando viridario forestæ, to discharge a verder of the forest in like sort.

De coronatore eligendo, to chuse a Coroner, two or three, if there need of so many in full County by the Free-holders of the County. And this is commonly upon the death or discharge of some of the Coroners, when it is upon the discharge, then this Writ rendreth the cause of their discharge. F. N. B. 163. c.

De electione viridariorum forestæ, to chuse a verder of the Forest in like sort. *Conge desier*, to Dean and Chapter, or such like to chuse their Bishop. F. N. B. 174. c.

Statutes.

25 H. 8. cap. 20. For the election, nomination, presentation, investing, and consecrating of Arch-Bishops and Bishops.

A writ for the Royal assent to signifie to the ordinary his assent to the Election of an Abbot, &c. and to will him to execute that which belongeth to him, therefore this is always to the ordinary himself.

De securitate invenienda qd. se non divertat ad partes extraneas sine licentia Regis, to compel one to find sufficient mainpernours in a reasonable sum of money, not to go into

forreign parts out of the Realm, without the Kings licence, nor any thing there attempt in contempt or prejudice of the K. or hurt of the people, nor send any thither for any such cause. And as a *Supplicavit* may be directed to the Justices of peace, or Sheriff, or both. And every one upon surmise to the Chancellor may sue this Writ for the King; for by the Common Law every one that will, may go out of the Realm for Merchandize, travel, or other cause at his pleasure without the Kings licence. But the King may restrain any subject by this Writ, or by his privy Seal or Signet, or by Proclamation without Writ, or other commandment, because every man is bound of common right to defend the King and his Realm.

5 R. 2. cap. 2. None shall go out of the Realm without the Kings leave upon pain of forfeiture of his goods, except the Lords and other great men of the Realm, known Merchants, and the Kings Souldiers.

Statutes repealed. 4 Jac. cap. 1.

Of *Dedimus potestatems.* The principal of them are these.

F. N. B. 170. b. *Dedimus potestatem*, to give the Kings Royal assent to the election of an Abbot, or such like, made or to be made, and to signifie so much by his Letters to the Ordinary, that he may do that which belongeth to him, and to receive fealty, &c. commanding the party to do the premisses. And therefore is directed to the party him.

himſelf that muſt do theſe things.

Dedimus poteſtatem de fine levando, to certain perſons to take the acknowledgment of a fine out of Court, when one that hath agreed in the Kings Court to levie a fine, is ſo feeble that he cannot travel, for every ſuch *dedimus poteſtatem*, ſuppoſeth a Writ of covenant, or ſuch like hanging. And they to whom this Writ is directed, muſt go in proper perſon to the parties to take the coniſance, which being certified to the Kings Juſts. of Com. Place, the fine ſhall be ingroſſed. The chief Juſt. of the Com. Pleas may take the acknowledgment of a fine without any *dedimus poteſtatem*, ſo can no other Judge, *de rigore Juris*. But a Juſtice of aſſiſe by a general Patent with a clauſe of *non obſtante* may. F. N. B. 156. g. Old N. B. 103. F. N. B. ibid. 1 H. 7. 9. Old N. B. ibid. 1 H 7. 9.

Statutes.

Stat. Carliſſ 15 E. 2. The *dedimus poteſtatem* ſhall be directed to two of the Juſtices, or one Juſtice and a Knight.

Prerogative.

Dedimus poteſtatem de attornato faciendo, for the Judges to admit an Atturney for one in a ſute, whether it be for the Plaintiff or Defendant, Demandant or Tenant, and in what action or ſute ſoever the ſame be. This Writ muſt be directed to the Judges themſelves, and groweth by the Kings Prerogative, F. N. B. 25. t.

rogative, for at the Common Law the parties must appear in proper person, not by Attorney, although the Statutes gave power afterwards to make Attorneys in divers cases, as appeareth before. But before those Statutes it seemeth that the K. might grant to any man to make an Attorney in any sute. And one reason thereof was, because it is no error though the Judg admit any Plaintiff or Defendant to make an Attorney, where by the Law he ought not.

Old N. B. 29. a. & b.

Prohibitorie ones are these that follow

A protection *cum clausula nolumus* **to free ones possessions**, land, rent, corn, cattle, carriage, &c. **that nothing be taken against his will for the Kings business**, by his officers or ministers. This may be as well for a secular as a spiritual person, and groweth by the Kings special favour.

F. N. B. 176. a.

Parsons or other spiritual persons not to be charged to the payment of fifteens, for goods in their possession annexed to their Churches,

Old N. B. 175. b.

Quod clerici non eligantur in officium baliui, **for a Clerk**, so is every one termed that is within holy orders, **not to be chosen an officer**, as Bayliff, Beedle, Reeve, &c. **for his lands**, and this writ reciteth that by the Common Law they ought not, and commandeth that if any distress or amerciament be levied, in this respect, it be restored.

F. N. B. 55. e. 14 H. 8. 6. Shelly

A prohibition to forbid tenant in dower, or by curtesie of England, or gardein by knight service, or in socage, to commit waste

waſte to the deſtruction of the inheritance. But this Writ lyeth not againſt leſſee for life or years, for they come in by their own leaſe; but in the other caſes before the Law maketh their eſtate.

The form of the writ.

F. N. B. 8. c.

14 *H.* 8. *ibid.*

Statutes.

Gloceſt. cap. 5. A man may have a Writ of waſte out of the Chancery againſt Tenant by curteſie or dower, or otherwiſe for term of life or years, and being attaint of waſte, he ſhall forfeit the waſte and treble damages.

Weſt. 2. cap. 14. The proceſs in a Writ of waſte ſhall be ſummons, attachment, diſtreſs, and if he come not, then a Writ unto the Sheriff, taking with him twelve men to go to the place waſted, and there inquire of the waſte, and upon that waſte returned, judgment ſhall be.

11 **H.** 6. **cap. 5.** Where the Tenant grants over his eſtate, but notwithſtanding takes the profits, and commits waſte, an action lies againſt him.

Mag. chart. cap. 4. The Guardein may not commit waſte on pain to loſe the wardſhip.

Cap. 5. And muſt repair and ſuſtain the houſes, of the profit of the land.

Gloceſt. cap. 5. If the Gardein commit waſte, and the Wardſhip loſt anſwer not the value of the damages, before the heirs age, then he ſhall render the damages to the heir

Artic. ſup. chart. cap. 18. Eſchetor committing Waſte upon Wards Land, ſhall

anſwer damages as is ordained before by Statute againſt them that do waſte in wards lands. So of a Subeſchetor, and if he be not able, his Maſter ſhall anſwer for him.

36 E. 3. cap. 13. Stat. 1. If the Eſchetor have a ward to anſwer to the King of the iſſues, and commit waſte, the heir ſhall have an action of waſte as well within age as of full age, and whilſt he is within age, if he cannot, his next friends ſhall have the ſute for him.

14 E. 3. cap. 12. The heir when he cometh to full age ſhall have an action of waſte againſt the Guardeins and Farmours to whom the King ſhall let the land in ward according to that Statute.

Weſtm. 2. cap. 22. A writ of waſte given for one Joyntenant or Tenant in Common, againſt another, wherein the Defendant to be at his choice to take his part in certain (and then to have for his part the place waſted) or to agree from thenceforth to take nothing more than his Companions do.

Gloceſt. cap. 13. Hanging a plea by writ the Tenant may not commit waſte, nor eſtrepment of the land in demand, and if he do, the Demandant may have a Writ to cauſe the land to be kept that no waſte nor eſtrepment be done.

Old N. B. 159. A *quo minus* for grantee of eſtovers, as houſeboot or heyboot, &c. to reſtrain the grantors from committing waſte, ſo as he cannot have his eſtovers.

De exoneratione ſecta, for Tenants by ſute

ſute of Court, or other rent or ſervices that they be not diſtreined to do the ſame for ſuch time as they ought to hold the land diſcharged. As one which is in ward to the King, a woman indowed in the Chancery of Lands ſo in ward, and the Tenants paravail of ſuch a ward, that is to ſay, where the other Lords, of whom the heir holdeth do diſtrein, for during ſuch time as the heir is in ward, either to the King or to his Committee, he is to do no ſute of Court or other ſervices, and if any diſtreſs be taken, it is by this Writ to be reſtored. F. N. B. 158.

De deonerando pro rata, to diſcharge the Tenant of parcel of the land according to the rate of his land when he is lawfully diſtreined for all the rent or ſervices. As where a man which holdeth a C. Acres of Land by the ſervice of repairing a bridge, alien in Fee 20 Acres to one man and 20 to another, and after, upon this preſented, one of the aliens is only diſtreined to make reparation, or where the Kings Tenant by Fealty and Rent alieneth parcel of the land, and the Kings officer diſtreineth the alienee for all the Rent, for the King is not bound by the Statute of *Quia emptores terrarum*, which will that the Feoffee ſhall hold *pro particula*, but that he may diſtrein for all the Rent in the part of the alienee, but ſuch a writ lyeth not where one that holdeth of a common perſon by Fealty and Rent, alieneth part of his land, for there the Statute F. N. Br. 235. b.

it ſelf reſtraineth the Lord that he cannot diſtrein the alienee, but after the rate and value of the Land which he hath purchaſed.

F. N. B. 226. i. *De eſſend. quiet. de Theolonio* to officers of Towns or other places not to greive ſpiritual perſons, or other that ought to be quit of paying of toll, murage, pannage, pontage, &c. whether by the Kings grant, or by preſcription.

F. N. B. 165. a. d. *De non ponendo in Juratis*, to diſcharge Peers of the Realm, or other perſons priviledged, as Clerks that are in the Kings ſervice, &c. from being of Jury, unleſs their preſence be for any ſpecial cauſe neceſſary. And this may be directed either to to the Sheriff not to put them into Juries, or the Judges to diſcharge them. But if a Peer of the Realm be returned, he muſt be ſworn or loſe iſſues, if he appear not, unleſs he bring the Writ.

F. N. B. 85. b. *Ne exeas regnum*, to the party himſelf to inhibit him to go into forreign parts without the Kings licence.

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